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Supreme Court, U.S.
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In The

Supreme Court of the United States

EUGENE TELFAIR,

Petitioner,

v.

FIRST UNION MORTGAGE CORPORATION

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Following confirmation of a Chapter 13 bankruptcy plan, does the automatic stay imposed by 11 U.S.C. §362(a) protect the property of the estate as defined by 11 U.S.C. §1306(a) until the case is closed or dismissed as provided for in 11 U.S.C. §362(c)(2), or is the only property protected by the automatic stay post-confirmation that property needed to fund the Chapter 13 plan?

2. In handling an escrow account which is governed by both RESPA, 12 U.S.C. § 2601, *et seq.*, RESPA regulations and VA regulations, can a mortgage holder use those escrow funds for purposes other than for taxes and insurance on property that is secured by the mortgage and enter into transactions whereby undisclosed profits and additional insurance benefits are received by it as part of a force-placed insurance program?

PARTIES TO THE PROCEEDINGS

The parties in this proceeding whose judgment is sought to be reviewed are as follows:

1. Eugene Telfair, the petitioner, who is obligated under a VA security deed held by First Union.

2. First Union Mortgage Corporation, the owner of the mortgage on Mr. Telfair's mortgage loan.

3. Pursuant to Supreme Court Rule 29.6, the parent corporation of First Union Mortgage Corporation is First Union Corporation.

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2. *The Eleventh Circuit Court of Appeals, in dealing with the force-placed insurance issue, has failed to consider the fact that mortgage escrow accounts for taxes and insurance are, under the Real Estate Settlement Procedures Act, property being held on behalf of Mr. Telfair, and has failed to recognize that under both RESPA and VA regulations that escrow monies held for hazard insurance can only be used for hazard insurance on the property involved and cannot be used for purposes of self-dealing or buying additional insurance products for the mortgage holder. To ignore federal regulations on this subject is to depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.* 5

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The Bankruptcy Court's opinion in In re Telfair is reported at 224 B.R. 243 (Bkrtcy. S.D. Ga. 1998). The District Court opinion dated April 20, 1999 is unpublished. The Eleventh Circuit Court of Appeals decision is reported at Telfair v. First Union, 216 F.3d 1333 (11th Cir. 2000).

STATEMENT OF JURISDICTION

The United States Bankruptcy Court for the Southern District of Georgia entered summary judgment in favor of First Union and against Mr. Telfair on August 26, 1998. A notice of appeal appealing that decision to the United States District Court for the Southern District of Georgia was filed on September 1, 1998. The United States District Court for the Southern District of Georgia affirmed the decision of the United States Bankruptcy Court for the Southern District of Georgia in an unpublished opinion on April 22, 1999. A notice of appeal was filed appealing that decision to the United States Court of Appeals for the Eleventh Circuit on April 29, 1999. The Eleventh Circuit Court of Appeals affirmed the decision of the district court on July 7, 2000. A petition for rehearing *en banc* was filed on July 27, 2000. The petition for rehearing *en banc* was denied on September 1, 2000. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

The following statutory provisions and regulations are involved in this case: 11 U.S.C. §362(a); 11 U.S.C. §362(c); 11 U.S.C. §506(b); 11 U.S.C. §1306(a); 11 U.S.C. §1327(b); 11 U.S.C. §1329; 12 U.S.C. §2601; 12 U.S.C. §2609; 24 C.F.R. §3500.17; 24 C.F.R. §3500.17(b) (*Definitions*) (*Escrow account)*; 24 C.F.R. §3500.17(c); 24 C.F.R. §3500.17(c)(5); 24 C.F.R. §3500.17(c)(f)(1)(2); 38 U.S.C. §3703(a)(2)(B); 38 U.S.C. §3703(c)(1); 38 C.F.R. §36.4512; 38 C.F.R. §36.4326.

The above statutes and regulations are contained in the Appendix.

STATEMENT OF THE CASE

Mr. Telfair filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Georgia on December 7, 1992, and his Chapter 13 plan was confirmed on May 3, 1993, with payments to the Chapter 13 trustee of $510 per month and future mortgage payments being paid directly by Mr. Telfair to First Union. This plan was later modified after confirmation on June 13, 1994. Before discharge, First Union filed three motions for modification of the automatic stay, alleged post-confirmation defaults in the paying of monthly mortgage payments to First Union; requested permission to have the stay modified so that it could foreclose and sought attorney's fees under 11 U.S.C. §506(b). Two of those motions were voluntarily withdrawn by First Union. In connection with the third motion, the United States Bankruptcy Court for the Southern District of Georgia entered an order on September 6, 1996 allowing Mr. Telfair time to trace certain money orders that were sent to First Union. No post-confirmation attorney's fees or expenses were ever authorized to be paid to First Union in that order. After a discharge order was entered, First Union began non-judicial foreclosure proceedings against Mr. Telfair's home. The default in the mortgage was in part caused by First Union's diverting post-confirmation mortgage payments to pay its attorney's fees allegedly incurred post-confirmation.

While Mr. Telfair was stationed in Europe, First Union used his escrow funds for taxes and insurance to purchase a force-placed insurance policy on Mr. Telfair's home through Balboa Insurance Company at a cost of approximately 2.5 to 3 times the cost of the original insurance policy maintained by Mr. Telfair. First Union's arrangement with Balboa provided undisclosed commissions of as much as 32% of the premiums, provided for the

shifting of certain servicing costs from First Union to Balboa and provided additional insurance benefits to First Union unrelated to hazard insurance on Mr. Telfair's home.

The bankruptcy court reopened this case after discharge, enjoined First Union from foreclosing upon Mr. Telfair's home and later entered summary judgment against Mr. Telfair, holding that the only property of the estate post-confirmation was Mr. Telfair's post-confirmation earnings used for payment of his Chapter 13 plan, holding that the application of monthly mortgage payments paid post-confirmation is not governed by federal bankruptcy law, and held that the bankruptcy court did not have to approve the assessment of attorney's fees post-confirmation, because 11 U.S.C. §506(b) was not applicable post-confirmation. In connection with the force-placed insurance issue, the bankruptcy court held that under the security deed no control was retained by Mr. Telfair over the use of his escrow funds; that First Union was given the ultimate decision as to how escrow funds are to be used upon Mr. Telfair's default; that the payment of taxes and insurance was for the benefit of First Union, not Mr. Telfair; that there was no implied or expressed trust created under the terms of the security deed relating to escrow funds; and that there was no breach of fiduciary duty by First Union in force-placing this insurance product. The bankruptcy court's decision was affirmed by the district court. The district court's opinion was affirmed by the Eleventh Circuit Court of Appeals. From the decision of the Eleventh Circuit Court of Appeals, this petition for *certiorari* is being filed.

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's opinion in this case conflicts with the 8th Circuit's opinion in Security Bank of Marshalltown v. Newman, 1 F.3d 687 (8th Cir. 1993), as to what constitutes property of the estate post-confirmation; has construed the provisions of 11 U.S.C. §1306(a), 11 U.S.C. §1327(b), 11 U.S.C. §506(b), and this Court's opinion in Rake v. Wade, 508 U.S. 464 (1993) in such a form and fashion which is inconsistent with the provisions of the Bankruptcy Code as a whole and which calls for this Court's exercise of its supervisory powers in connection with the administration of justice.

Chapter 13 bankruptcy proceedings are designed to allow over-extended individuals to reorganize and rehabilitate themselves and at the same time to pay their creditors. Chapter 13 cases are not set in stone at confirmation, but are fluid cases that can be modified after confirmation at the request of the debtor, the Chapter 13 trustee or the holder of an unsecured claim to either increase or reduce payments, or the time for repayment. 11 U.S.C. §1329. Therefore, until a plan is confirmed, it is impossible to know exactly what money will be necessary to fund the plan since these amounts can vary.

Because of a possible conflict in the language used in defining "property of the estate" in a Chapter 13 case in 11 U.S.C. §1306(a) and the language used in 11 U.S.C. §1327(b), bankruptcy courts, district courts and three circuit courts of appeal have adopted different constructions which are generally referred to as the "estate termination approach", the "estate transformation approach", and the "estate preservation approach." The 11th Circuit, in this case, and the 7th Circuit in In re Heath, 115 F.3d 521 (7th Cir. 1997) have adopted the estate transformation approach in

construing these two code sections. The 8th Circuit in Security Bank of Marshalltown v. Newman, supra, as well as a number of district and bankruptcy courts have adopted the estate preservation approach. In re Kolenda, 212 B.R. 851 (U.S.D.C. W.D. Mich. 1997); In re Aneiro, 72 B.R. 424 (S.D. Cal. 1987); In re Henry, 143 B.R. 811 (W.D. Pa. 1992); In re Clark, 71 B.R. 747 (Bkrtcy. E.D. Pa. 1987). The estate preservation approach has the advantage of preserving and protecting the estate as a source of payments in the Chapter 13 case or in the event of a subsequent conversion to Chapter 7, and as a measure of payments in any plan modification proceedings or a bad faith conversion to Chapter 7 under 11 U.S.C. §348(f)(2). Collier on Bankruptcy, 15th Ed., Vol. 8, ¶1327.03[2], p.1327-10.

If the purposes of Chapter 13 cases are to be achieved, the bankruptcy courts must control how the debtor's assets are to be used until the class is closed, dismissed, or a discharge is entered.

Each year, approximately 400,000 non-business Chapter 13 cases are commenced in the bankruptcy courts. Control of the debtor and his property, as well as the application of payments during the pendency of the Chapter 13 case must remain with the bankruptcy courts. Otherwise, unscrupulous debtors or overzealous secured creditors—not the bankruptcy courts—will control the ultimate outcome of Chapter 13 plans.

If the estate transformation approach were adopted as the law in this nation, an unscrupulous debtor who had a substantial equity in a home and who had certain unsecured debt problems could propose a Chapter 13 plan which allowed him to keep his equity, and pay his unsecured creditors in full over a period of years. That same debtor, if revested with his substantial equity at confirmation, would

have the power to sell the equity without any bankruptcy court approval, squander the proceeds, and then convert the case to Chapter 7. Likewise, a secured creditors could divert plan payments paid directly to it to the payment of attorney's fees in any sum it desired.

In Rake v. Wade, 508 U.S. 464 (1993), this Court dealt with the limited issue of whether an over secured creditor was entitled to interest post-confirmation on its arrearages, even if the mortgage instruments were silent on the subject and state law would not have required interest to be paid. In Rake, supra, the petitioners, the respondent and the United States as *amicus curiae* agreed that 11 U.S.C. §506(b) only regulated interest from filing through the confirmation date. While this Court's decision in Rake did hold that 11 U.S.C. §506(b) was not applicable to post-confirmation interest, it did not hold that the rate of interest post-confirmation was subject to the whim of the creditor, but left that in the breast of the bankruptcy court – an indication that post-confirmation the bankruptcy court still oversees the applications of debtor's payments to the creditor. In order for attorney's fees to be collected in a bankruptcy proceeding, the fees must be provided for in the note or security deed. Georgia requires notice before perfection of attorney's fees. O.C.G.A. §13-1-11. Collier provides that 11 U.S.C. §506(b) preempts those state notice requirements. Collier on Bankruptcy, 15th ed., ¶ 506.04(3)(1)(I), pp.506-119 to 120. What in reality occurs is that at the time a mortgage holder files its post-petition claim in a Chapter 13 case, that claim includes the terms of the note and mortgage relating to attorney's fees that are not then perfected. In Georgia, attorney's fees are contingent until compliance with the notice requirements. O.C.G.A. §13-1-11. In a Chapter 13 case, since the state law notice requirements are being preempted by 11 U.S.C. §506(b), that contingent claim for attorney's fees filed when the initial

claim was filed by the secured creditor are perfected post-confirmation if the bankruptcy court makes a determination that the secured creditor is entitled to a post-confirmation fee. To the extent that this Court's decision in Rake v. Wade, supra, has created confusion about the bankruptcy court's power to decide if and in what amount attorney's fees are due a secured creditor post-confirmation, this Court should grant this petition and decide that issue.

2. The Eleventh Circuit Court of Appeals, in dealing with the force-placed insurance issue, has failed to consider the fact that mortgage escrow accounts for taxes and insurance are, under the Real Estate Settlement Procedures Act, property being held on behalf of Mr. Telfair, and has failed to recognize that under both RESPA and VA regulations that escrow monies held for hazard insurance can only be used for hazard insurance on the property involved and cannot be used for purposes of self-dealing or buying additional insurance products for the mortgage holder. To ignore federal regulations on this subject is to depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The bankruptcy court, without any argument from either party below, found that under the security deed no control was retained by Mr. Telfair over First Union's use of escrow funds; that First Union was given the ultimate decision as to how these funds were to be used; and that the escrow funds were for the benefit of First Union, not Mr. Telfair. 224 B.R. 251. The bankruptcy court, relying upon a line of pre-RESPA cases, held that there is no fiduciary duty which would prohibit a mortgage holder from using its force-placed insurance program to make excessive undisclosed commission profits and to include in its force-placed insurance program provisions that shift servicing costs, or

which provide additional insurance benefits to it in addition to providing property insurance for the collateral. Mr. Telfair does not dispute the right of First Union to force-place insurance, but does dispute First Union's right to use a force-placed insurance program to receive kickbacks in the form of commissions, to save servicing expenses, and to recover additional insurance benefits. The purpose of RESPA was to prevent mortgage holders from receiving kickbacks or from keeping excessive escrow cushions. 12 U.S.C. § 2601. RESPA and the applicable regulations limit the escrow cushion that a mortgage servicer can hold in an escrow account. The RESPA regulations specifically provide that the funds are being held "on behalf of the borrower." 24 C.F.R. §3500.17 *(Definitions)(Escrow accounts)*. Monies held in an escrow account to pay insurance charges are for insurance charges "respecting the mortgaged property." 12 U.S.C. §2609; 24 C.F.R. §3500.17(c)(1)(i).

Furthermore, federal laws which govern VA-guaranteed loans authorize the Secretary of Veterans Affairs to pass regulations relating to these types of loans. 38 U.S.C. §3703(1)(2)(B)(C)(1). These regulations specifically provide that mortgage insurance coverage can only be purchased for the "security property." 38 C.F.R. §36.4512(a); §36.4326. If the Eleventh Circuit's opinion relating to force-placing of insurance is the law, then the purposes behind RESPA, its regulations and VA regulations, will be thwarted.

The VA security deed creates an expressed trust relating to escrow funds and lenders breach their fiduciary duties by self-dealing with those funds.

If the decision of the Eleventh Circuit on this case is allowed to stand, mortgage services will be able to easily

thwart the purpose of RESPA relating to escrow accounts; will, when servicing loans, force-place insurance policies at excessive rates not for the purpose of protecting their collateral but in order to create another profit center.

CONCLUSION

This Court should grant this petition, adopt the estate preservation approach in construing 11 U.S.C. §1306(a) and 11 U.S.C. §1327(b), hold that the bankruptcy court controls the right of a secured creditor to assess attorneys fees against a debtor postconfirmation, and hold that under RESPA and VA regulations force-placed insurance cannot be used as a vehicle for a lender's receiving kickbacks.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-10846

D.C. DOCKET NO. 98-00193-CV-198-193

EUGENE M. TELFAIR

Plaintiff-Appellant

vs.

FIRST UNION MORTGAGE CORPORATION

Defendant-Appellee

Appeal from the United States District Court for the southern District of Georgia

(July 7, 2000)

Before TJOFLAT, MARCUS, and KRAVITCH, Circuit Judge.

KRAVITCH, Circuit Judge:

In this review of the bankruptcy court's grant of Appellee's motion for summary judgment we consider the propriety of an attorney's fees award to an oversecured creditor in a Chapter 13 bankruptcy proceeding and determine whether Georgia law imposes fiduciary duties on a mortgagee's administration of a mortgagor's escrow fund. Finally, we review the bankruptcy court's consideration of an affidavit purportedly inconsistent with the affiant's prior

testimony as well as the bankruptcy court's denial of Appellant's motion for class certification. We affirm the district court's decision affirming the bankruptcy court on all grounds.

I. BACKGROUND AND PROCEDURAL HISTORY

Appellant Eugene Telfair and his wife obtained a Veteran's Administration VA) guaranteed loan in 1984 from Appellee First Union Mortgage Corporation's ("First Union") predecessor-in-interest. Pursuant to a VA form Security Deed ("the Deed"), the Telfairs secured the loan with their home and agreed to make "single monthly payments towards the principal and interest as well as to pay a *pro rata* share of the annual tax and insurance obligations to be placed in an escrow account.[1] First Union would make payments from this fund as they came due; any excess funds either would be refunded to the Telfairs or applied to future payments at First Union's discretion and the Telfairs would be responsible for any shortfall.[2] The Deed also provided that the Telfairs would be charged for any expense, and attorney's fees incurred by First Union in protecting the secured. property, whether from default, foreclosure proceedings, or litigation.[3] Finally, the Deed obligated the Telfairs to maintain hazard insurance on their home continuously, the provider of which had to be approved by First Union. If the Telfairs failed to provide proof of such continuous coverage, the Deed authorized First Union to "force place" hazard insurance to protect its collateral.[4] First

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[1] See Security Deed ¶2, in BR, Part A, Tab 1, Ex. B.

[2] See id. ¶ 3.

[3] See id. ¶ 6.

[4] See id. ¶ 8.

Union exercised this prerogative in 1988 when the Telfairs failed to provide proof of coverage.

On December 7, 1992, Mr. Telfair filed a Chapter 13 bankruptcy petition in which he proposed a series of payments to satisfy the existing arrearage on the First Union mortgage; the plan was confirmed on May 3, 1993. Outside of the plan, the Telfairs remained responsible for making their usual monthly mortgage payments to First Union, a responsibility that was not always met. After confirmation, First Union filed three separate motions to lift the automatic stay imposed by 11 U.S.C. § 362(a) to recover its costs incurred in attempting to recoup the defaulted payments. First Union assessed attorney's fees incurred with these motions against the Telfairs' account, which created a delinquency following the Chapter 13 payments and discharge.[5] First Union then notified the Telfairs of its intent to foreclose on the property based upon this default.

The Telfairs responded by filing a two-count complaint against First Union in the bankruptcy court asserting various violations by First Union in its assessment of attorney's fees and its forced placement of the hazard insurance. The Telfairs also sought certification of their claims for class action under Federal Rule of Civil Procedure 23. After First Union moved for summary judgment on both counts, the bankruptcy court held a class certification hearing during which it also entertained argument on the summary judgment motion. The bankruptcy court first concluded that

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[5] Mr. Telfair and First Union dispute the nature of the funds First Union diverted to pay attorney's fees. The bankruptcy court found that First Union had applied unspecified "post-petition payments" to pay the attorney's fees and we see no reason to delve deeper because it does not affect our disposition of this appeal.

Mrs. Telfair was not an appropriate class representative and dismissed her claim. The court then granted summary judgment to First Union on both substantive counts, rendering Mr. Telfair's request for class certification moot. The bankruptcy court also denied Mr. Telfair's motion to strike an affidavit submitted by First Union in support of its summary judgment motion. The district court affirmed the bankruptcy court on all grounds, and Mr. Telfair ("Telfair") timely appealed.

II. DISCUSSION

In his appeal, Telfair challenges the bankruptcy and district courts' conclusions that First Union's appropriation of attorney's fees from the Telfairs' account did not implicate 11 U.S.C. § 506(b) or 11 U.S.C. § 362(a) and did not violate any fiduciary duties of First Union. We review the bankruptcy court's "'findings of facts for clear error and the legal conclusions of the bankruptcy and district courts *de novo.* See In re Southeast Bank Corp., 97 F.3d 476, 478 (11th Cir. 1996). Telfair also appeals the bankruptcy court's denial of his motion to strike an affidavit, which we will uphold unless it was an abuse of discretion, Goulah v. Ford Motor Co., 118 F.3d 1478, 1483 (11th Cir. 1997).[6]

A. Attorney's Fees

During the pendency of the Chapter 13 plan, the Telfairs defaulted on several regular loan payments. In order

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[6] Telfair raised an assortment of other arguments before the district court and in his briefs submitted to this court, relying on such diverse provisions as Bankruptcy Rule 2016, REPSA, 12 U.S.C. § 2609, 24 C.F.R. 3500.17(b), and Ga. Code Ann. 8 13-1-11. These arguments were not timely raised before the bankruptcy court, and we decline to hear them for the first time on this appeal. See In re Daikin Miami Overseas, Inc., 868 F.2d 1201, 1206 (11th Cir. 1989).

to recoup the costs incurred in attempting to cure these defaults, First Union filed three separate requests for attorney's fees. First Union voluntarily withdrew the first two requests in order to verify receipt of payments allegedly sent by the Telfairs. After the third filing, two money order payments could not be verified, and the bankruptcy court granted the Telfairs ninety days to trace the missing payments. The Telfairs declined to either trace or resubmit the payments. After the plan was discharged, First Union applied post-petition mortgage payments to the outstanding attorney's fees, an action which Telfair contends violated two provisions of the bankruptcy code: 11 U.S.C.§506(b), governing costs and fees for oversecured claims[7], and 11 U.S.C. 362(a), the automatic stay provision.[8] Neither of these claims has merit.

1. Section 506

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[7] An oversecured claim is one for which the collateral exceeds the debt. See In re Delta Resources, Inc., 54 F.3d 722, 724 n.1 (11th Cir. 1995).

[8] Before the bankruptcy and district courts, Telfair also argued that assessment of the attorney's fees violated the discharge provisions of 11 U.S.C. § 1328 and § 524. Section 1328 provides that upon completion of plan payments, the bankruptcy court shall discharge any debts under the plan or disallowed under section 502 except for any debt provided for under section 1322(b)(5), which allows a homeowner to cure a default through a plan up until the time of foreclosure. See 11 U.S.C. § 1328 (1999). Section 524 clarifies that a discharge voids' any conflicting judgments on discharged debt and bars any future claim for discharged debt. See 11 U.S.C. § 524 (1999). The bankruptcy and district courts found these provisions inapplicable to the post-confirmation attorney's fees sought by First Union because (1) they were not provided for under the plan; (2) they were not disallowed under section 502; and (3) they would be excludable in any event under section 1322(b)(5). Telfair does not appear to challenge this aspect of the courts' conclusion on appeal as he mentions it only in passing in his initial brief. Even if he had raised this issue however, we would affirm the bankruptcy and district courts.

Under his Chapter 13 plan, Telfair agreed to pay supplemental payments towards the arrearage owed to First Union. After this plan was confirmed on May 3, 1993, the Telfairs made all of the required plan payments and the plan was eventually discharged on April 23, 1997. During that time, however, the Telfairs had defaulted on several of their regular loan payments due after confirmation. The attorney's fees assessed by First Union were expended in curing these defaults and thus were allowed under the terms of the Deed. Telfair does not dispute that the Deed provided for the fees taken by First Union, but asserts that First Union should have requested them as part of an amendment to the plan under Section 506(b), which provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b) (1999). Holders of these oversecured claims are entitled, under this section, to any interest, fees, or costs provided for in the underlying debt instrument. Because First Union failed to secure an amendment to the plan before paying itself attorney's fees, Telfair contends that it removed assets from the estate in violation of the automatic stay.

The district court affirmed the bankruptcy court's conclusion that section 506(b) only governs fee petitions until the time of confirmation. Because the attorney's fees incurred by First Union arose from its attempts to cure post-

confirmation defaults, the bankruptcy and district courts determined that the terms Of the Deed, without reference to section 506(b), governed the award of fees. The Deed expressly provided for the attorney's fees assessed by First Union against Telfair.

In considering an oversecured creditor's claim for interest, the Supreme Court has stated that interest accrues under section 506(b) "as part of the allowed claim from the petition date until the confirmation or effective date of the plan." Rake v. Wade, 508 U.S. 464, 471, 113 S. Ct. 2187, 2191 (1993).[9] The fact that the parties in Rake agreed that section 506(19) only applied in the post-petition confirmation period does not undermine the imperative effect of the Court's decision, and this court has recognized as such. See In re Delta Resources, Inc., 54 F.3d 722, 727 (11th Cir. 1995); see also. 4 Collier on Bankruptcy ¶ 506.04[2] (Lawrence P. King et al. eds., 15th ed. 2000) ("Section 506(b)... has no application to a secured creditor's entitlement to post-confirmation interest. . .").

Telfair relies on a pre-Rake decision for the proposition that a mortgagee should not divert maintenance payments to pay for attorney's fees without court approval. See In re Rathe, 114 B.R. 253 (Bankr. D. Idaho 1990). The creditor in Rathe, however, sought to include attorney's fees as part of its secured claim, and could only do so under section 506(b). See id. at 256. To the extent that the reasoning of In re Rathe .is inconsistent with the intervening Rake decision, it has been overruled.

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[9] Rake was overruled by statute on other grounds, but the new legislation did not affect agreements entered into before October 22, 1994 and so would not affect our disposition of this case i~ any event. See In re Smith, 85 F.3d 1555, 1558 n.3 (llth Cir. 1996).

Telfair next seeks to distinguish Rake on the ground that it involved interest accruing on claims prior to confirmation and only in dictum suggested that its holding would apply to attorney's fees. This court, however, can find no basis to distinguish Rake's statement that section 506(b) "applies only from the date of filing through the confirmation date," 508 U.S. at 468, 113 S. Ct. at 2190, on the ground that it dealt with interest rather than attorney's fees. Cf. In re Harko, 2.11 B.R. 116. 119 (B.A.P. 2d Cir. 1997) ("There is nothing in the language of § 506(b) to suggest that interest, as opposed to fees, costs and charges, should be treated any differently and the majority of courts have so held."). Indeed, a contrary result would be inconsistent with the purpose of section 506(b), which allows oversecured creditors to include post-petition interest and certain fees as part of the secured claim they will receive upon confirmation of the plan. See In re Delta Resources, 54 F.3d at 729. In this case, the attorney's fees that First Union sought were not part of its secured claim; they arose apart from the plan and after confirmation.

Telfair's final argument is that the mutable nature of a Chapter 13 proceeding even after confirmation counsels in favor of bankruptcy courts using section 506(b) to maintain their control over post-confirmation awards of attorney's fees. Telfair suggests that without this instrument, "secured creditors in Chapter 13 cases are going to run amok" following confirmation.[10] We appreciate Telfair's concern, but are satisfied that the terms of debt instruments agreed to by debtors and creditors provide adequate protection for Chapter 13 debtors.[11]

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[10] Appellant's Br. at 32.

[11] Section 1322, which also governs post-confirmation awards of interest or fees, provides further protection to homeowners and homestead lenders. See 11 U.S.C. § 1322 (1999).

2. Section 362(a)

Pursuant to section 362(a), the filing of a bankruptcy petition acts as an automatic stay against actions or claims against the property of the bankruptcy estate. See 11 U.S.C. § 362(a) (1999).[12] Telfair contends that First Union's diversion of payments to recover attorney's fees ran afoul of the stay provision because the funds were property of his bankruptcy estate. Central to our consideration of this contention is a determination of what constitutes property of the estate following confirmation of a bankruptcy plan. According to section 1306:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title-
>
> . . .
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12

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[12] The relevant portion of section 362(a) reads --

[A] petition filed under section 301,302, or 303 of this title.., operates as a stay, applicable to all entities, of-

. . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, prefect, or enforce any lien against property of the estate;

. . .

11 U.S.C. § 362(a) (1999).

of this title, whichever occurs first.

> (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1306 (1999). A later section of the code provides that "[e]xcept as otherwise provided in the plan or order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b) (1999). Read together, these two provisions create a tension to the extent they govern the debtor's post-confirmation earnings: section 362 appears to protect those earnings while section 1327(b) would vest those same earnings in the debtor, thereby divesting them of the protection of section 362(a).

In resolving this conflict, courts have adopted one of three models: the estate termination approach, the estate preservation approach, and the estate transformation approach. Under the estate termination approach, all property of the estate becomes property of the debtor upon confirmation and ceases to be property of the estate. See In re Petruccelli, 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990). According to the estate preservation approach, all property of the estate remains property of the estate after confirmation until discharge, dismissal, or conversion. See In re Kolenda, 212 B.R. 851,853 (W.D. Mich. 1997). A compromise between these two extremes is struck by the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. See In re Heath, 115 F.3d 521,524 (7th Cir. 1997); In re McKnight, 136 B.R. 891,894 (Bankr. S.D. Ga. 1992).

Urging this court to adopt the estate preservation approach, Telfair raises the specter of unscrupulous debtors "free to do whatever they please with their property when it is revested in them."[13] Telfair presents a fair challenge to the estate termination approach, which does not protect the post-confirmation obligations of the bankruptcy plan. The estate transformation approach, however, protects the interests of both the debtor and the creditors.

Consideration of the case law and the general concerns of the bankruptcy code assures us that the estate transformation approach, adopted by the bankruptcy courts in the Southern District of Georgia, should be the law of this circuit. We therefore echo the conclusion of the Seventh Circuit and "read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." In re Heath., 115 3d at 524. In this case, after confirmation, only the amount required for the plan payments remained property of the estate. Telfair's regular loan payments, made outside of the plan, were therefore no longer property of the estate and First Union's application of a portion of those payments to attorney's fees pursuant to the Deed did not violate section 362(a).[14]

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[13] Appellant's Br. at 36.

[14] Even if First Union technically applied plan payments to attorney's fees and then applied a regular loan payment towards the plan payments, our conclusion would not be different because, ultimately, all the plan payments were properly applied, as evidenced by the bankruptcy court's discharge of Telfair's plan.

B. Forced Insurance

Under the terms of the Deed, the Telfairs were required to maintain hazard insurance on their home, with a provision allowing First Union to "force place" hazard insurance if the Telfairs let their coverage lapse. In 1988, the Telfairs failed to provide proof of coverage and First Union exercised its prerogative to "force place" insurance on the secured property. Rather than obtaining a policy with the Telfair's previous insurance company, First Union arranged for coverage by Transamerica Premier Insurance Company and then, a year later, by Balboa Insurance Company ("Balboa"), both which charged substantially higher premiums and paid considerable commissions to First Union.[15] First Union paid for these premiums with funds from the Telfairs' escrow account. Telfair contends that this arrangement violated First Union's fiduciary duties arising from either its administration of the Telfairs' escrow account as a trust or its role as the Telfairs' agent.

As evidence that the escrow account was an enforceable trust or obligated First Union as their agent, Telfair cites the Deed's requirement that he and his wife "pay to [First Union] as trustee (under the terms of this trust as hereinafter stated)"[16] tax and insurance payments that First Union would pay as they came due. Unpersuaded by this semantic argument, the bankruptcy court concluded, and the

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[15] Telfair attributes a nefarious purpose to First Union's arrangement with Balboa; the change in coverage, however, was prompted by the Telfairs' own lapse and, according to First Union,'s discontinuation of coverage in Georgia by the Telfairs' previous carrier. In addition, although First Union alerted the Telfairs to the higher rates, the Telfairs did not secure replacement insurance until 1998, ten years after the initial lapse.

[16] Security Deed, ¶ 2, in BR, Part A, Tab 1, Ex. B.

district court agreed, that, under Georgia law, a mortgagee's administration of an escrow account gives rise to neither a trust nor an agency relationship.

A. trust born under Georgia law may be either express or implied. An express trust must be in writing and "shall have each of the following elements, ascertainable with reasonable certainty: (1) An intention by the settler to create a trust; (2) Trust property; (3) A beneficiary; (4) A trustee; and (5) Active duties, imposed on the trustee, which duties may be specified in writing or implied by law." Ga. Code Ann. § 53-12-20 (1997). An implied constructive trust, as claimed by the Telfairs, is found "whenever the circumstances are such that the Person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." Id. § 53-12-93(a).

As correctly found by the bankruptcy and district courts, there is no evidence that either type of trust was formed because there is no indication that the Telfairs and First Union intended the escrow funds to comprise a trust corpus. Rather, First Union's retention of future tax and insurance payments inured to the benefit of both parties in protecting the secured property.[17] See Moore v. Bank of Fitzgerald, 483 S.E.2d 135, 139 (Ga. Ct. App. 1997) ("[A]bsent special circumstances. . . there is. . .no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor

[17] Telfair's citation to First Union employee's deposition testimony that the funds in the escrow accounts belong to the customers, see BR, Part J, Tabl 11 at 20 (Pam Swallow Dep.), is unavailing. Although this testimony may have enlightened the bankruptcy court's consideration of Whether, as a matter of Georgia law, the escrow funds comprised an enforceable trust, the bankruptcy 'court was not bound by it in reaching its ultimate conclusion.

with clearly opposite interests.") (internal quotation marks and citation omitted). Although the Deed used the word "trust," the Georgia Court of Appeals has noted that

> [t]he majority rule appears to be that funds paid by a mortgagor to an escrow account to be used by the mortgagee to meet tax and insurance obligations.., do not constitute trust properties such as would render the mortgagee accountable to the mortgagor for any earnings or profits from the funds.

Knight v. First Fed. Say. & Loan Ass'n, 260 S.E.2d 511, 515 (Ga. Ct. App. 1979). This observation is in accord with the case law. See Ferdinand S. Tinio, Annotation, Rights in Funds Representing "Escrow" Payments Made By Mortgagor in Advance to Cover Taxes or Insurance, 50 A.L.R.3d 697 § 3 (1973); see also Judd v. First Fed. Say. & Loan Ass'n, 710 F.2d 1237, 1241 (7th Cir. 1983) (mere use of trust terminology in a VA form security deed does not create a fiduciary duty).

Liberty National Life Insurance Co. v. United States, 463 F.2d 1027 (5th Cir. 1972), relied on by Telfair, is not to the contrary.[18] In Liberty National, the former Fifth Circuit concluded that a mortgagor's escrow funds created a trust' asset of the mortgagee bank for federal income tax purposes. See 463 F.2d at 1029-30. Not only was this opinion decided on federal rather than state law, but the narrowness of its holding was recognized by this court five years later when it concluded that, for other tax purposes, mortgage escrow funds created "a contractual obligation and nothing more." Southwestern Life Ins. Co. v. United States, 560 F.2d

[18] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (1 11th Cir. 1981) (en banc), plaintiffs court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

627,634 (5th Cir. 1977).

The same reasoning compels the conclusion that First Union's administration of the Telfairs' escrow account did not thrust on them the role of agent. Under Georgia law, agency results from the manifestation of mutual consent that one person will act on the other's behalf and subject to the other's control. See, Smith v. Merck 57 S.E.2d 326, 332 (Ga. 1950). In the case of escrow funds held by a mortgagee for payment of tax and insurance payments on b~half of a mortgagor pursuant to a security agreement, the mortgagee does not act as agent because the mortgagee acts neither for the sole benefit of the mortgagor nor under the mortgagor's control. See, Georgia Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n, 262 S.E.2d 147, 150 (Ga. Ct. App. 1979) (a mortgagee does not act as the agent of its mortgagor when it sought insurance for the secured property). Here, for example, although the terms of the Deed constrain First Union's use of the escrow funds, any insurance obtained with those funds had to meet First Union's approval, and the Telfairs lacked the authority: to either direct the use of the escrowed funds or to terminate First Union's control thereof. 'We therefore affirm the conclusion of the bankruptcy and district courts that administration of escrow funds such as the one here, without more, does not create an agency relationship under Georgia law.

C. The De Gorter Affidavit

Telfair contends error in the bankruptcy court's consideration of an affidavit submitted by First Union. The affidavit of David de Gorter, Balboa's former Assistant Vice President for Marketing, describes Balboa's insurance product. Because de Gorter had professed ignorance of many specifics of the product during his previous deposition,

Telfair maintains that the subsequent inconsistent affidavit should have been stricken as a "sham." See, Van T. Junkins & Assocs. v. U.S. Indus., 736 F.2d 656, 656 (11th Cir. 1984) ("[A] district court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts its prior testimony without giving any valid explanation."). The bankruptcy court, however, accepted First Union's explanation of the disparity: that de Gorter had informed himself of the insurance policy's terms in the interval between his deposition and affidavit. This is a valid explanation, and we cannot say that its acceptance by the bankruptcy and district courts was an abuse of discretion. In any event, de Gorter's familiarity was based only on other materials in the record, so it is difficult to see whence any prejudice would have come.

D. Class Certification

After determining that none of Telfair's underlying claims had merit, the bankruptcy court came to the ineluctable conclusion that there were no claims to certify as a class action lawsuit.[19] It was within the court's discretion to consider the merits of the claims before their amenability to class certification. See, Cowen v Bank United of Texas, 70 F.3d 937, 941 (7th Cir.1995); Wright v. Schock, 742 F.2d 541,543-44 (9th Cir.1984); Katz v. Carte Blanche Corp., 496 F.2d 747, 758 (3d Cir. 1974) (en banc). With no meritorious claims, certification of those claims as a class action is moot. Because we agree with the bankruptcy and district courts' disposition of the merits of Telfair's claims, we also affirm the denial of the motion for class certification.

[19] The bankruptcy court also denied Mrs. Telfair's motion for class certification on the ground that her claims were not sufficient representative, but she does not appeal this decision.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decision affirming the bankruptcy court in all respects.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

Civil Action File Number: CV198-193

EUGENE M. TELFAIR

Appellant

vs.

FIRST UNION MORTGAGE CORPORATION

Appellee

I. Introduction.

On August 28, 1998 Chief Judge John S. Dalis of the United States Bankruptcy Court for the Southern District of Georgia issued an Order granting summary judgement to First Union Mortgage Corporation. Eugene Telfair appeals that Order and prays this Court to reverse the judgement of Judge Dalis. For the reasons that follow, the Court **AFFIRMS** the decision entered in the Bankruptcy Court.

II. Standard of Review.

It is well established that a reviewing court must accept the findings of fact by the Bankruptcy Court unless those findings are clearly erroneous. See In re Greenbook Carpet Co., Inc., 722 F.2d 659 (llth Cir. 1984) ; In re Johnson, 960 F.2d 396, 399 (4th Cir. 1992). As a basis for appellate review, a finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction, based on the

entire record of evidence, that a mistake has been committed. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

"While this Court is obliged to accept a Bankruptcy Court's undisturbed findings of fact unless they are clearly erroneous, it is not required to accept its conclusions as to the legal effect of those findings." See Brunner v. New York State Higher Educ. Services Corp., 831 F.2d 395, 396 (2nd Cir. 1987). Legal determinations reached by the Bankruptcy Court normally are reviewed by this Court de novo. See Johnson, 960 F.2d at 399. Evidentiary rulings by the trial court are reviewed for a clear abuse of discretion. See Judd v. Rodman, 105 F.3d 1339, 1341 (11th Cir. 1997). Similarly, the trial court's determination as to whether to certify a complaint as a class action is reviewed for an abuse of discretion. See Heaven v. Trust Company Bank, 118 F.3d 735 (11th Cir. 1997).

III. Background.

The Court accepts the findings of fact issued by the Bankruptcy Court and essentially restates those findings below.

In 1984, Eugene Telfair and his wife obtained a Veteran's Administration (VA) guaranteedl oan from First Union's predecessor in interest. As part of that loan, the Telfairs executed a vA form Security Deed which granted a security interest in their Richmond County, Georgia residence. Several provisions of the Security Deed are germane to this appeal.[1]

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[1] The actual language of the relevant summarized paragraphs follows:

2. Together with and in addition to the monthly payments of principal and interest payable under the terms of the note secured hereby, he will pay to the Grantee as trustee (under the terms of this trust as hereinafter stated) on the first day of each month until the said note is fully paid, the following sums:

(a) A sum equal to the ground rents, if any next due, plus the premiums that will next become due and payable on policies of fire and any other hazard insurance covering these premises, plus taxes and assessments next due on the premises covered by this Security Deed (all as estimated by the Grantee, and of which the Grantor is notified) less all sums already paid therefore, divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, taxes and assessments will become delinquent, such sums to be held by the Grantee in trust to pay said ground rents, premiums, taxes, and special assessments.

(b) The aggregate of the amounts payable pursuant to subparagraph(a) and those payable on the note secured hereby, shall be paid in a single payment each month, to be applied to the following items in the order stated:

(I) ground rents, taxes, special assessments, fire and other hazard insurance premiums;

(II) interest on the note secured hereby; and

(III) amortization of the principal of said note.

Any deficiency in the amount of such aggregate monthly payment shall, unless made good by the Grantor prior to the due date of the next such payment, constitute an event of default under the Security Deed. At Grantee's option, Grantor will pay a "late charge" not exceeding four per centum (4%) of any installment when paid more than fifteen days after the due date thereof to cover the extra expense involved in handling delinquent payments, but such "late charge" shall not be payable out of the proceeds of any sale made to satisfy the indebtedness secured hereby, unless such proceeds are sufficient to discharge the entire indebtedness and all proper costs and expenses secured thereby.

3. If the total of the payments made by the Grantor under (a) of paragraph 2 preceding shall exceed the amount of payments actually made by the Grantee as trustee for ground rents, taxes, assessments, or insurance premiums, as the case may be, such excess shall be credited by the Grantee on subsequent payments to be made by the Grantor for such items or, at Grantee's option, as trustee shall be refunded to Grantor. If, however, such monthly payments shall not be sufficient to pay such items when the same shall become due and payable, the Grantor shall pay *to* the Grantee as trustee any amount necessary to make up the deficiency. Such payments shall be made within thirty (30) days after written notice from the Grantee stating the amount of the deficiency, which notice may be given by mail. If at any time the Grantor shall tender to the Grantee, in accordance with the provisions of the note secured hereby, full payment of the entire indebtedness represented thereby, the Grantee as trustee shall, in computing the amount of such indebtedness, credit to the account of the Grantor any credit balance remaining under the provisions of (a) of paragraph 2 hereof. If there shall be a default under any of the provisions of this Security Deed resulting in a public sale of the premises covered hereby, or if the Grantee acquires the property otherwise after default, the Grantee as trustee shall apply, at the time of the commencement of such proceedings, or at the time the property is otherwise acquired, the amount then remaining to credit of Grantor under (a) of paragraph 2 preceding, as a credit on the interest accrued and unpaid and the balance to the principal then remaining unpaid on said note.

6. Such expenses and fees as may be incurred in the protection of said premises, including the fees of any attorney employed by the Grantee for the collection of any or all of the indebtedness hereby secured, or foreclosure by Grantee's sale, or court proceedings or in any other litigation or proceeding affecting said premises, and attorneys' fees reasonably incurred in any other way, shall be paid by the Grantor.

8. He will continuously maintain hazard insurance, of such type or types and amounts as the Grantee may from time to time require, on the improvements now or hereafter on said premises, and except when payment for all such premiums has theretofore been made under (a) of paragraph 2 hereof, will pay promptly when due any premiums therefor. All insurance shall be carried in companies approved by the Grantee and the policies and renewals thereof shall be held by Grantee and have attached thereto loss payable clauses in favor of and in form acceptable

Among other things, Paragraph Two of the Deed states that the Telfairs, as mortgagors,[2] shall make single monthly payments that consist of principal and interest payments, as well as a pro rata share of yearly taxes and insurance premiums. That section also provides that First Union, as successor in interest to the original mortgagee, shall hold these tax and insurance payments in "trust" and pay those obligations as they become due.

Paragraph Three provides that if the tax and insurance premium paid by the Telfairs exceeds the amount actually due, the mortgagee shall have the option of either refunding those amounts directly to the Telfairs or crediting the excess to subsequent monthly payments. That section also creates an obligation in the Telfairs to pay the mortgagee any amount necessary to make up any tax or insurance shortage covered by the mortgagee.

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to the Grantee. In event of loss Grantor will give immediate notice by mail to Grantee, and Grantee may make proof of loss if not made promptly by Grantor, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Grantee instead of to Grantor and Grantee jointly, and the insurance proceeds, or any part thereof, may be applied by Grantee at its option either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event of foreclosure of this Security Deed, or other transfer of title to the premises covered hereby in extinguishment of the indebtedness secured hereby, all right, title and interest of the Grantor in and to any insurance policies then in force shall pass to the purchaser or Grantee.

[2] The Security Deed actually uses grantor (for the Telfairs) and grantee (for First Union's predecessor). For simplicity and clarity, this Order will use mortgagor and mortgage.

Paragraph Six of the Deed creates an obligation in the Telfairs to pay for any expenses and attorney fees incurred by the mortgagee in protecting the residence. This part includes fees incurred in collecting any part of the indebtedness, foreclosure proceedings, or litigation.

Paragraph Eight provides that the Telfairs will continuously maintain hazard insurance on the residence. This section also states that all insurance shall be carried by companies approved by the mortgagee.

In 1988, the Telfairs failed to provide proof of insurance on the residence as required by the Security Deed. First Union then "force placed" insurance on the secured property. Instead of using the Telfairs' prior company, which First Union contends had ceased providing this type of coverage in Georgia, First Union made arrangements for Balboa Insurance Company to insure the residence. First Union received commissions from Balboa, and Balboa charged higher premiums than those charged by the Telfairs' prior insurer.

Mr. Telfair claims that he did not receive any notice that his required insurance had lapsed, or that First Union had force placed insurance with Balboa. However, Balboa continued to insure the residence until well after Mr. Telfair filed for bankruptcy. Finally, after nearly ten years of force placed insurance, the Telfairs obtained their own insurance with State Farm on March 31, 1998.

On December 7, 1992 Mr. Telfair filed for Chapter 13 protection. His plan was confirmed on May 3, 1993. After confirmation of Mr. Telfair's plan, First Union filed three motions to lift the stay imposed by 11 U.S.C. § 362(a) because Mr. Telfair had failed to make payments due under his Chapter 13 plan and the loan documents. These motions

were filed on June 19, 1995, July 31, 1995, and May 20, 1996. In accordance with Paragraph Six of the Security Deed, First Union assessed the attorneys fees and expenses arising from these motions to the Telfairs. First Union then applied payments received from the trustee and the Telfairs to these fees and expenses, which resulted in a delinquency in the Telfair account upon completion of the Chapter 13 plan payments and discharge. This delinquency caused the Telfairs to be in default, and First Union notified them of the pending foreclosure on the residence secured by the Deed.

On September 23, 1997, the Telfairs filed a two count adversary proceeding in the Bankruptcy Court against First Union. They styled the proceeding as a class action and sought equitable and injunctive relief. Count One of the complaint alleged (1) that First Union violated 11 U.S.C. § 506(b) when it collected attorneys fees and expenses without court approval; (2) that First Union violated the automatic stay imposed by 11 U.S.C. § 362(a) by taking property of Mr. Telfair's bankruptcy estate; and (3) that First Union violated the discharge injunction of 11 U.S.C. § 524 and 11 U.S.C. § 1328. Count Two of the complaint alleged (1) that First: Union breached a fiduciary duty that arose out of the alleged trust created by the prepayment of taxes and insurance premiums when it force placed the insurance and received a profit; and (2) that First Union breached a fiduciary duty that arose from an alleged agency relation created by the tax and insurance escrow account when it force placed the insurance and received a profit.

On May 22, 1998, First Union moved for summary judgement on both counts of the complaint. The Bankruptcy Court held a class certification hearing on June I, 1998, at which time Judge Dalis entertained oral argument and admitted evidence concerning class issues. Some of the issues raised in the class certification hearing also bore on

the substantive merits of the action. During that hearing, Judge Dalis determined that Mrs. Telfair was not an appropriate plaintiff or class representative because she was not a debtor in the original Chapter 13 filing. Judge Dalis also denied the Telfairs' motion to strike the affidavit of David de Gorter during the hearing. On June 12, 1998, the Telfairs submitted a brief in opposition to First Union's motion for summary judgement.

Judge Dalis ruled that First Union was entitled to summary judgement on both counts on August 26, 1998. In his Order, Judge Dalis held that Mr. Telfair could not succeed on Count One because (1) 11 U.S.C. § 506(b) does not apply to claimed post-confirmation attorneys fees and expenses; (2) First Union did not violate the stay of 11 U.S.C. § 362(a) because once Mr. Telfair's earnings were paid to First Union they were no longer considered property of the estate and § 362 has no bearing on how First Union credited the Telfairs' account; and (3) 11 U.S.C. § 1328 and 11 U.S.C. § 524 do not apply in this case. As for Count Two, Judge Dalis held that First Union did not owe any fiduciary duty to Mr. Telfair because (1) no trust was created by the Telfairs' deposit of funds into a tax and insurance escrow account; and (2) no agency was created because the Telfairs maintained no control over how First Union used the tax and insurance escrow funds.

Mr. Telfair timely appealed the ruling of the Bankruptcy Court and has raised several issues for review by this Court. Essentially, Mr. Telfair's challenges can be grouped in four analytical categories. First, Mr. Telfair challenges the substantive rulings pertaining to Count One.[3]

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[3] Mr. Telfair lists five separate issues pertaining to Count One. However, the first portion of Telfair's brief on appeal groups all five putative issues under one umbrella argument styled "The Bankruptcy Court erred in its order granting summary judgement by holding that 11 U.S.C. § 506(b)

Second, he argues that the Bankruptcy Court erred in holding that no fiduciary duty was created. Third, Mr. Telfair asserts that Judge Dalis should not nave admitted the affidavit of David de Gorter at the class certification hearing. Finally, he

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had no application post-confirmation; in holding that 11 U.S.C. § 362 had no application post-confirmation concerning the utilization of post-petition payments made by the Telfairs to reimburse First Union for its attorney's fees and expenses; and by holding that First Union did not violate 11 U.S.C. ~ 328 [sic] and 11 U.S.C. ~ 524 in the application of post-confirmation payments." Telfair App. Br. at 15. Hardly a model of clarity, this section purports to also apply to two other "holdings" below, neither of which will be considered in this Order.

First, in his "Statement of the Issues Presented," Telfair cites as a separate issue on appeal whether the Bankruptcy Court erred "in holding that bankruptcy law did not govern the charging of post-confirmation attorney's fees to the Telfairs?" Telfair App. Br. at viii. To the degree that this issue relates to the substantive Code provisions raised below, the Court will, of course, review the merits of those holdings. However, the Court cannot peruse the annals of bankruptcy law to determine whether any provision applies to post-confirmation attorney fees. It was incumbent upon counsel to raise specific arguments when it opposed First Union's motion for summary judgement so that they could be addressed by the Bankruptcy Court in the first instance.

Second, Telfair also lists as a separate issue whether the Bankruptcy Court erred in "holding that post-confirmation the Telfairs' home was no longer property of the estate." Telfair App. Br. at viii. Again, to the degree that this relates to issues below, this Court will review the Bankruptcy Court's holding. However, Judge Dalis's Order does not explicitly hold that the Telfairs' residence was not part of the estate, because that issue was never raised below. From the complaint and Mr. Telfair's brief in opposition to the motion for summary judgement it is clear that the focal issue concerning property of the estate was Mr. Telfair's post-confirmation earnings, not his residence. Complaint at p.6 ~ 24, p.7 ~ 29 , Br. in Opp. at 7-8. Judge Dalis analyzed the earnings issue only, and this Court will not entertain arguments concerning the status of the residence because they were not raised below. See Caban-Wheeler v. Elsea, 71 F.3d 837, 841 (11th Cir. 1996) (appellate courts will generally not consider an issue first raised on appeal).

argues that the Bankruptcy Court erred in denying his motion for class certification as moot.

IV. Analysis.

A. The Bankruptcy Court did not err as to Count One.

1. 11 U.S.C. § 506(b) does not apply post-confirmation. Judge Dalis held that 11 U.S.C. § 506(b) has no application to the attorneys fees at issue in this case because they arose after confirmation of Mr. Telfair's Chapter 13 plan, and § 506 has no application post-confirmation, 11 U.S.C. § 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b) (1993). "Section 506(b) governs the allowance of postpetition interest, fees, costs and charges as part of a secured claim." COLLIER ON BANKRUPTCY § 506.04 (15th Ed. 1998).

In Rake v. Wade, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191, 124 L.Ed.2d 424 (1993),[4] the Supreme Court stated

[4] 4 Rake was subsequently overruled by statute, but that subsequent legislative act does not affect this case because it does not apply to agreements entered into before October 22, 1994. See 11 U.S.C. § 1322(e re Hardware, 189 B.R. 273, 276 & n.3 (Bankr. E.D.N.Y. 1995).

that § 506(b) only applies in the post-petition period until confirmation of the debtor's plan. See Id. at 471-72, 113 S.Ct. at 2191-992 (stating, "as the parties acknowledge, such interest accrues [under § 506(b)] as part of the allowed claim from the petition date until the confirmation or effective date of the plan" and "§ 506(b) entitles the mortgagee to preconfirmation interest"). Indeed, other courts have reiterated the fact that Rake established that § 506(b) only applies before confirmation of the plan. See e.g., In re Hatcher, 208 B.R. 959, 965 (B.A.P. 10th Cir.), aff'd without opinion, 133 F.3d 932 (10th Cir. 1998) (stating "Rake concluded that § 506(b) applies to mortgagees during the post-petition, pre-confirmation period"); In re Brenner, 189 B.R. 121, 124 (Bankr. N.D. Ohio 1995)(stating "the Court held that the oversecured creditor is entitled to interest on its secured claim before the confirmation of the plan under § 506(b)").

On appeal, Mr. Telfair argued that "11 U.S.C. § 506 is a limitation on the allowance of attorney's fees, late charges and expenses pre-confirmation and post-confirmation." Telfair App. Br. at 25. In support of his contention that Judge Dalis erred in holding that § 506(b) had no application after confirmation of his Chapter 13 plan, Mr. Telfair cited In re Rathe, 114 B.R. 253 (Bankr. D. Idaho 1990) and In re Keaton, 182 B.R. 203 (Bankr. E.D. Tenn. 1995). Neither case establishes that Judge Dalis erred.

In In re Rathe, a pre-Rake decision, the Bankruptcy Court for the District of Idaho analyzed a similar set of facts and concluded that "court approval for the payment of interest, fees, costs or charges 'provided for under the agreement' must be obtained under the provisions of Section 506(b)." 114 B.R. at 256. Some of the attorneys fees at issue in that case, like those in the case sub judice, arose from the filing of a post-confirmation motion for stay relief. Id. Mr.

Telfair contends that this Court should apply the reasoning of In re Rathe and hold that First Union violated § 506(b) when it charged him for its post-confirmation attorneys fees without court approval.

While In re Rathe appears to be a factually similar case with relatively persuasive reasoning, a deeper analysis of that bankruptcy court's reasoning demonstrates why this Court cannot follow its result. In reaching its decision, the Rathe court assumed that § 506(b) was applicable after confirmation of the debtor's plan, because some of the attorneys fees and expenses which it disallowed for failing to obtain court approval arose post-confirmation. Id. Even assuming that the Rathe court's reasoning is correct in requiring court approval under § 506(b), this Court cannot follow that part of the holding which applies § 506(b) after confirmation. To do so would contradict the clear language of the Supreme Court in Rake. Thus, even though In re Rathe is persuasive, that part of the holding that is necessary for Mr. Telfair's argument to succeed is no longer good law.

Similarly, In re Keeton, 182 B.R. 203 (Bankr. E.D. Tenn. 1995) provides little help for Mr. Telfair. In that case, the bankruptcy court allowed an undersecured creditor's claim for attorneys fees based on its contractual rights under the terms of a automobile loan. Id. at 205 n.l. While it is not exactly clear whether the fees at issue in that case were incurred before or after the confirmation of the Chapter 13 plan, the bankruptcy court characterized the fees as a pre-petition claim. See Id. (stating "[m]istakenly, debtors refer to the attorney's fees as 'postpetition' fees. While the representation might have been performed after the petition was filed, Boatmen's right to collect attorney's fees arose out of the contract and is a prepetition claim").

It is not clear to the Court why Mr. Telfair relies on In re Keaton, or how that case demonstrates that Judge Dalis erred. In re Keaton analyzes the issue of contract-based attorneys fees as a pre-petition claim; it says nothing about whether 11 U.S.C. § 506 applies post-confirmation. Furthermore, Judge Dalis found that the attorneys fees at issue here arose post-confirmation. He did not characterize them as a pre-petition claim and Mr. Telfair makes no substantive contention that this characterization was erroneous. Finally, even if Mr. Telfair had clearly and properly raised the issue of whether the fees at issue here should have been characterized as a pre-petition claim, this Court would not be inclined to follow the bankruptcy court's decision in In re Keaton because it has been vacated by the Court of Appeals for the Sixth Circuit. See In re Keaton, 145 F.3d 1331 (6th Cir. 1998) (vacating as moot the decision of the District Court for the Eastern District of Tennessee which affirmed the bankruptcy court, 212 B.R. 587 (1997), and the decision of the bankruptcy court, 182 B.R. 203).

As the Bankruptcy Court below concluded, § 506(b) does not apply post-confirmation. Mr. Telfair's contention that Judge Dalis erred in reaching that conclusion fails. Accordingly, this Court affirms that part of the holding below.

2. First Union did not violate the stay of 11 U.S.C. § 362(a) when it assessed attorneys fees to Mr. Telfair.

Judge Dalis held that First Union did not violate the stay imposed by 11 U.S.C. 362(a) because once Mr. Telfair made his payments to First Union those funds were no longer property of the estate. As the payments lost their identity as property of the estate upon receipt by First Union, § 362(a) does not control the question of whether or not First Union's application of those funds was improper.

Accordingly, Judge Dalis ruled that § 362(a) was not violated. 11 U.S.C. § 362(a) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of-
>
> > (l) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, -or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > (2) the enforcement, against the debtor or against property of the estate, of a judgement obtained before the commencement of the case under this title;
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> >
> > (4) any act to create, perfect, or enforce any lien against property of the estate;
> >
> > (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
>
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a) (1993).

Mr. Telfair apparently argues that when First Union diverted payments to cover attorneys fees, which created the post discharge default situation, it violated either § 362(a) (3) or § 362 (a) (4). Cf. In re Toth, 193 B.R. 992, 993 (Bankr. N.D. Ga. 1996) (stating that the only provisions of §362(a) (3) and (4) could be violated by a claim arising after commencement of the plan; no other subsection was applicable). In support of this contention, he argued below that Mr. Telfair's plan payments and scheduled mortgage payments constituted "property of the estate" as that term is employed in § 362(a). Complaint at ¶ 24, 29, Br. in Opp. at 6-8. On appeal, however, Mr. Telfair now argues that his home was property of the estate and was protected by the automatic stay. Telfair App. Br. at 18-25. This change in argument appears directed at an effort to create a false dichotomy in the decisional law within the Bankruptcy Court for the Southern District. As the Court will explain below, there is no such conflict. Furthermore, Mr. Telfair cannot now focus his argument on the status of his home, because the focus in the trial court was on his post-petition earnings. As this Court has mentioned before, it cannot consider

arguments raised for the first time on appeal. See In re Daikin Miami Overseas, Inc., 868 F.2d 1201, 1206 (11th Cir. 1989).

Mr. Telfair devotes considerable effort to convincing this Court: that "Judge Lamar Davis and Chief Judge John S. Dalis have differing views as what [sic] is included in 'property of the estate' after confirmation of a Chapter 13 plan." Telfair App. Br. at 15. In support of this purported dichotomy, Mr. Telfair compares Judge Davis's decisions in In re Deeble, 169 B.R. 240 (Bankr. S.D. Ga. 1994) and In re Gamble, 208 B.R. 598 (Bankr. S.D. Ga. 1997) with Judge Dalis's holding in this case and In re McKnight, 136 B.R. 891 (Bankr. S.D. Ga. 1992). However, even a cursory overview of these cases demonstrates that no contradiction exists between them.

First, In re Deeble and In re Gamble on the "appropriate disposition of exempt property during the pendency of a Chapter 13 case." In re Gamble, 208 B.R. at 599, Cf., In re Deeble, 169 B.R. at 243. Those cases do not conflict with the reasoning in In re McKnight, where Judge Dalis focused on finding a "reconciliation of 11 U.S.C. § 1306(a) (2) and § 1327(b)." In re McKnight, 136 B.R. at 893. In short, the two groups of cases have nothing to do with each other.

Second, even if this Court found some conflict in these lines of cases, it would have to follow the reasoning in In re McKnight, because the Court of Appeals for the Eleventh Circuit recently reversed this Court's prior Order affirming In re Gamble. See In re Gamble, 168 F.3d 442, 443 (11th Cir. 1999). Thus, In re Gamble, and the reasoning underlying In re Deeble, is no longer good law.

Returning to the question of whether First Union violated the stay of § 362(a) when it utilized post-petition payments for its attorneys fees, the Court must briefly examine the meaning of "property of the estate" as the term is used in § 362(a). 11 U.S.C. § 1306 provides:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title
>
> > (2) earnings from services performed by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted to a case under chapter 7, ii, or 12 of this title, whichever occurs first.
>
> (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1306(a) (2) (1993). In addition, 11 U.S.C. § 1327(b) states "[e]xcept as otherwise provided in the plan or order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b) (1993). Many courts have recognized that these two provisions conflict because a debtor's post-confirmation earnings appear to remain property of the bankruptcy estate under § 1306(a) (2), and thus subject to § 362(a) protection, while § 1327(b) indicates that confirmation vests all of the debtor's property, including future post-confirmation earnings, in the debtor and renders those funds beyond the protection of the § 362(a) stay. See e.g., In re McKnight, 136 B.R. 891, 892 (Bankr. S.D. Ga. 1992); In re Petrucelli, 113 B.R. 5, 6 (Bankr. S.D. Cal. 1990).

The courts have resolved the "property of the estate" conflict between § 1306 and § 1327 in three analytical

approaches. First, some courts have held that upon confirmation, all property of the estate becomes property of the debtor and is no longer property of the estate. See e.g., In re Petrucelli, 113 B.R. at 15. This approach is referred to as the estate termination approach, because after plan confirmation there is no "property of the estate." A second approach is called the estate preservation approach. Courts following this course hold that vesting upon confirmation as indicated by § 1327(b) "is understood to remove no property from the estate." In re Kolenda, 212 B.R. 851, 852 (W.D. Mich. 1997). Thus, under the estate preservation approach, everything included in the bankruptcy estate before confirmation remains as property of estate until discharge, dismissal, or conversion of the case. Finally, the estate transformation approach attempts to reconcile the conflict by holding that only property necessary for execution of the plan is considered "property of the estate" post-confirmation. See e.g., In re Heath, 115 F.3d. 521, 524 (7th Cir. 1997).

In the Southern District of Georgia, the Bankruptcy Court has adopted the estate transformation approach. See In re McKnight, 136 B.R. at 894. Thus, in the case sub judice, Judge Dalis determined that after confirmation the only "property of the estate" was that portion of Mr. Telfair's income that was necessary to fund plan payments. On appeal, Mr. Telfair argues that this Court: should adopt the estate preservation approach. Through its own research, the Court has not uncovered any Eleventh Circuit case determining which approach is binding on this Court; nor has either party argued that the Court is so bound.[5] Absent some binding precedent, this Court is unwilling to disturb the well

[5] Mr. Telfair cites Carver v. Carver, 954 F.2d 1573, 1577 (11th Cir. 1992) for the proposition that property of the estate in a Chapter 13 proceeding is all encompassing. While that decision makes a dicta statement to that effect, the Carver court was not dealing with the 1306/1327 conflict. For this reason, Carver does not require the result Mr. Telfair espouses.

considered approach of the Bankruptcy Court. The estate transformation approach is a viable means of reconciling the conflict between § 1306 and § 1327 concerning property of the estate after plan confirmation and it is followed by courts in other districts. See e.g., In re Marcowicz, 150 B.R. 461, 462 (Bankr. D. Nev. 1993); In re Zeigler, 136 B.R. 497, 502 (Bankr. N.D. Ill. 1992); In re Root, 61 B.R. 984, 985 (Bankr. D. Colo. 1986).

Accordingly, after confirmation of his plan, only that portion of Mr. Telfair's income devoted to plan payments was considered property of the estate. Mr. Telfair has not demonstrated how First Union acted to obtain possession of such property as prohibited by § 362(a) (3) or acted to create a lien on such property as prohibited by § 362(a) (4). Rather, Mr. Telfair made his plan payments for pre-petition arrearages and his scheduled mortgage payments to First Union. Once First Union received those funds, it applied a portion of them to the attorneys fees in accordance with its contractual right. However, once that money was tendered to the creditor First Union, it became property of First Union and lost its status as property of the bankruptcy estate. Mr. Telfair has not demonstrated how this violated the stay imposed by 362(a). Accordingly, that portion of the Bankruptcy Court's Order holding that there was no § 362 stay violation is affirmed.

3. First Union did not violate the discharge of 11 U.S.C. § 1328 or the discharge injunction of 11 U.S.C. § 524.

Judge Dalis held that First Union did not violate the discharge of 11 U.S.C. § 1328 or the discharge injunction of 11 U.S.C. § 524 because neither provision was applicable to the facts of this case. Even though Mr. Telfair charges that the Bankr Bankruptcy Court erred in reaching this determination, he does not offer any substantive argument to that effect in his Appellate Brief or Reply Brief. In fact, his only reference to these Code provisions is found at the conclusion of his discussion of In re Rathe. He states, "In that case, the Bankruptcy Court specifically held that the injunctive provisions of 11 U.S.C. § 1328 and 11 U.S.C. § 524 operated to enjoin the diversion of plan payments either made by the trustee or by the debtor directly to anything other than the pre-petition arrearage or post-petition payments." Telfair App. Br. at 27.

The essence of the decision in In re Rathe is that the mortgagee/creditor cannot assign attorneys fees, interest, or costs to the mortgagor/debtor at any time before discharge without permission from the bankruptcy court. That court was unwilling to allow the creditor to take any action with regard to the debtor without court approval. However, as this Court determined earlier, In re Rathe, at least inconsistent with Rake to the degree that it relies on the application of § 506(b) post-confirmation as the source for the necessity of court approval of these fees and costs. See supra Part IV.A.I. In regard to the discharge injunction of 1328, the In re Rathe court essentially held that because the mortgagee/creditor did not apply to the court for fee approval before discharge, as it was required, those fees, interest, and costs were disallowed after discharge on account of the injunction. This Court finds Judge Dalis's reasoning more convincing.

Judge Dalis reasoned that § 1328 and § 524 were not applicable here. Section 1328 provides:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-
>
> (l) provided for under section 1322(b) (5) of this title ....

11 U.S.C.A. § 1328 (1993 and Supp. 1999). Section 524 provides:

> (a) A discharge in a case under this title
>
> (l) voids any judgement at any time obtained, to the extent that such judgement is a determination of the personal liability of the debtor with respect to any debt discharged under section 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of any action, the employment of process, or any act, to collect, recover or offset an such debt as a personal liability of the debtor, whether or not discharge of such debt is waived

11 U.S.C.A. § 524 (1993). Together, these provisions discharge certain of the debtor's debts and prohibit actions of the creditor to recover on such discharged debts. However, in the case sub judice, the debt at issue, post-confirmation attorneys fees, is not covered by the § 1328 discharge or the § 524 injunction. First, post-confirmation attorneys fees were not provided for under Mr. Telfair's plan. Second, those fees

were not allowed under § 502. Finally, § 1328 specifically excludes any debt under § 1322(b) (5), which applies to Mr. Telfair's debt to First Union. In his brief, Mr. Telfair has made no attempt to demonstrate how these rulings were erroneous as a matter of law. Finding no error otherwise, this Court affirms that portion of the order below.

B. The-Bankruptcy Court did not err as to Count Two.

1. No fiduciary relationship existed.

Count Two of Mr. Telfair's complaint charges that First Union is liable because it breached a fiduciary duty that it owed to him. While the Count is subdivided into two alternative methods of establishing this relationship, it is important to evaluate the question of whether First Union owed Mr. Telfair a fiduciary duty from a more general perspective because the bulk of the case law that controls this case approaches the present issue in the same manner. Indeed, as the Court will explain below, there is an absence of Georgia cases concerning whether a trust or agency relation arose concerning the tax and insurance funds. See infra Part IV.B.2 and Part IV.B.3. However, the Georgia state courts have been quite clear that, as a general matter, there is no fiduciary relationship between a mortgagor and mortgagee.

Whether or not a fiduciary relationship existed between the parties is a matter of Georgia law. Quaif v. Johnson, 4 F.3d 950, 952 (11th Cir. 1993). Under Georgia law, "[t]here is never a presumption of confidential relationship. The burden is on the party asserting same to establish its existence." United States v. Northeast Construction Co. of West Virginia, 298 F.Supp. 1135, 1141 (S.D. Ga. 1969) (citing Crawford v. Crawford, 134 Ga. 114,

67 S.E. 673 (1910)). Accordingly, Mr. Telfair bears the burden of convincing the Court that First Union owed him a fiduciary duty. As the Bankruptcy Court correctly concluded, Mr. Telfair cannot make the requisite showing.

> Section 23-2-58 of the Official Code of Georgia provides:
>
> Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

O.C.G.A. § 23-2-58 (1982). In the context of banking, the Supreme Court of Georgia has stated that "[t]here is no confidential relationship between a bank and its customers merely because the customer has advised with, relied upon, and trusted the bankers in the past." Citizens and Southern Nat'l Bank v. Arnold, 240 Ga. 200, 1201, 240 S.E.2d 3 (1977) (citing First American Bank v. Bishop, 239 Ga. 809, 809, 239 S.E.2d 19 (1977)).

More recently, the Court of Appeals of Georgia held that no confidential or fiduciary relationship arises between a mortgagor and a mortgagee. Moore v. Bank of Fitzgerald, 225 Ga. App. 122, 126, 483 S.E.2d 135 (1997). In Moore, a mortgagor/debtor in bankruptcy sued a mortgagee/creditor on the theory that the bank had breached a fiduciary duty to the mortgagor when it obtained stay relief and foreclosed on her cattle farm. Id. at 125. The mortgagor contended that the mortgagee had undertaken a fiduciary position with regard to

the cattle business and farm, which was the mortgaged property, because the bank required her to make monthly reports about the business so it could monitor the operation. Id. In analyzing the question of whether a fiduciary relationship may arise between a mortgagor and a mortgagee, the Moore court examined several Georgia cases and found no support for such a relationship.

First, the Moore court noted that the Supreme Court of Georgia refused to find a fiduciary duty between a bank and its *customer* in Citizens and Southern. Moore, 225 Ga. App. at 125 (citing Citizens and Southern, 239 Ga. at 809). Second, the court reiterated its prior holding that "absent special circumstances there is 'particularly no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests.'" Moore, 225 Ga. App. at 125 (quoting Pardue v. Bankers First Fed. Savings and Loan Ass'n, 175 Ga. App. 814, 815, 334 S.E.2d 926 (1985)). In Pardue, the Court of Appeals of Georgia examined O.C.G.A. § 23-2-58 and found that under that code section and the relevant case law, there "was no basis whatever to support a fiduciary duty between lender and borrower or bank and customer which would impose a duty upon the bank to advise appellants concerning their tax status." Pardue, 175 Ga. App. at 814. Finally, the Moore court noted that "'[t]he mere fact that one reposes trust and confidence in another does not create a confidential relationship. In the majority of business dealings, opposite parties have trust and confidence in each others integrity, but there is no confidential relationship by this alone.'" Moore, 225 Ga. App. at 126 (quoting Lewis v. Alderman, 117 Ga. App. 855, 162 S.E.2d 440 (1968) (internal citation omitted)).

In addition to Moore and the cases cited above, the Court of Appeals of Georgia has refused to impose a

fiduciary obligation on a mortgagee to inspect a contractor's repair work on a home partially destroyed by fire when the mortgagee is making direct payments from insurance proceeds. See Charter Mortgage Co., v. Gray, 174 Ga. App. 502, 503, 330 S.E.2d 440 (1985); and McWaters v. Frederick W. Berens, Inc., 143 Ga. App. 392, 394, 238 S.E.2d 717 (1977). Similarly, in another decision, the Court of Appeals of Georgia found no fiduciary relationship in a typical arms-length lending transaction. See Saffar v. Chrysler First Business Credit Corp., 215 Ga. App. 239, 241-242, 450 S.E.2d 267 (1994).

In total, the Georgia cases are clear that no fiduciary relationship arises between a mortgagee and a mortgagor in the absence of some special circumstances. On appeal, Mr. Telfair has offered the Court no reason to distinguish this body of case law from the particular facts of this case. As the Court will explain below, neither the trust nor agency theory he propounds is viable, particularly in the face of this precedent. Given the clear body of case law and Mr. Telfair's inability to distinguish it, this Court is convinced that a Georgia Court analyzing the present case would refuse to find that a fiduciary duty could arise between the parties.

2. No trust was created.

The Bankruptcy Court held that the portion of Telfair's monthly mortgage payment to First Union devoted to future insurance and tax obligations did not create a trust. Because there was no trust relationship, First Union did not owe Mr. Telfair any fiduciary duty. On appeal, Mr. Telfair argues that this determination was erroneous.

After an independent review of the Georgia statutory and case law, this Court concludes that no trust arose

concerning the tax and insurance funds. Section 53-12-20 of the Official Code of
Georgia lists the elements of an express trust. That section provides:

> (a) An express trust shall be created or declared in writing.
>
> (b) An express trust shall have each of the following elements, ascertainable with reasonable certainty:
>
> (1) An intention by the settlor to create a trust;
>
> (2) Trust property;
>
> (3) A beneficiary;
>
> (4) A trustee; and
>
> (5) Active duties imposed on the trustee, which duties may be specified in the writing or implied by law.

O.C.G.A. § 53-12-20 (1997). The principal barrier to finding a trust: in this case is the absence of any ascertainable intent of the parties to create a trust.

Mr. Telfair argues that this intent is evident from the fact that the word "trustee" appears in the Security Deed several times, and that the Deed refers to the mortgage as "trustee."[6] Neither party has cited to any Georgia cases

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[6] 6 Mr. Telfair also argues that the deposition testimony of First Union's group leader for escrow and funds administration that the escrow money is the customer's money is conclusive proof that a trust was formed. The group leader's testimony is not evidence of the formative intent of the parties, nor does that testimony bear on the legal determination of

holding that the recitation of "trust" language is sufficient to render a document an express trust, and the Court has been unable to uncover any on its own. Absent some indication that a Georgia state court would treat the issue differently,[7] this Court is inclined to follow those courts which have held that the use of such language is not enough to establish a trust. See Judd v. First Federal Savings and Loan, 710 F.2d 1237, 1241 (7th Cir. 1983) (holding, without specifying that the issue was a matter of state law, that "despite the scattered use of the words 'trust' and 'trustee,' and the phrase 'in trust,' [in VA form security deed] the mortgages do not transform a traditional debtor-creditor relationship into a fiduciary relationship"); Cf. Southwestern Life Insurance Co., v. United States, 9 Cl. Ct. 102, 106 (Cl. Ct. 1985) (stating, in tax context, "the mere presence, standing alone, of 'in trust' language in some of the security agreements in the present record does not bear significantly on the question of whether plaintiff held the escrow payments as a bona fide trustee. This is true both under Texas law and generally.").[8]

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whether a trust was formed.

[7] The Court's analysis on this issue is heavily influenced by the fact that Georgia state courts have unanimously declined to find a fiduciary relationship arising from a tax and insurance escrow, or arising between a mortgagee and mortgagor generally. See supra Part IV.B.I. Indeed, it would be analytically inconsistent to hold on the one hand that no fiduciary duty arose, but on the other that a trust did arise.

[8] 8 In Liberty National Life Insurance Co., v. United States, 463 F.2d 1027 (5th Cir. 1972), the former Fifth Circuit treated escrow funds like those at issue in this case as trust property when deciding whether a life insurance company had to treat this type of escrow funds as assets for federal income tax purposes. The decisions of the former Fifth Circuit are binding on this Court. Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Nevertheless, that decision does not convince this Court that, as a matter of Georgia law, a trust arose in regard to the funds at issue here. First, the Fifth Circuit's Liberty National decision made no mention of Georgia law, the case arose in Alabama, and the

Several reasons support the Bankruptcy Court's conclusion that the parties did not intend to create a trust. Rather, their relationship was a typical debtor/creditor relationship under which no fiduciary duty arises in Georgia. See In re Colony Square, 843 F.2d 479, 482 (11th Cir. 1988). First, Mr. Telfair and First Union's predecessor in interest made no manifestation of intent to form a trust other than signing a standard form document. Cf. Judd, 710 F.2d at 1241. Second, according to the Security Deed, "[a]ny deficiency in the amount of [the] aggregate monthly payment shall constitute an event of default." Thus, if Mr. Telfair failed to pay that portion of his monthly payment dedicated as his escrow obligation, he would be in default on the entire mortgage. This type of term signifies a typical debtor/creditor relationship. See Id. Finally, as the Court of Appeals of Georgia has noted:

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court was interpreting "the difficult maze of the federal income tax laws which govern life insurance companies." Liberty National, 463 F.2d at 1028-29. Second, as another panel of the Fifth Circuit later acknowledged, the Liberty National court summarily concluded that a trust arose without any analysis of the issue nor discussion of the: documents involved. See Southwestern Life Insurance Co., v. United States, 560 F.2d 627, 633 (5th Cir. 1977). Third, :he Southwestern Life court concluded, five years after Liberty National, that the same type of mortgage escrow funds created only "a contractual obligation and nothing more." Southwestern Life, 560 F.2d at 634. Finally, given the overwhelming unanimity of the Georgia state courts that no fiduciary duty arises between a mortgagee and mortgagor given their opposite interests, this Court is convinced that a Georgia state court examining the issue would find no trust here. After all, whether or not a trust exists in this case is a matter of Georgia law. See Quaif v. Johnson, 4 F.3d 950, 955 (11th Cir. 1993) (question of whether or not debtor owed fiduciary duty based upon trust in adversary proceeding was a question of state law).

> [t]he majority rule appears to be that funds paid by a mortgagor to an escrow account to be used by the mortgagee to meet tax and insurance obligations do not constitute trust properties such as would render the mortgagee accountable to the mortgagor for any earnings or profits from the funds.

Knight v. First Federal Savings and Loan Ass., 151 Ga. App. 447, 451, 260 S.E.2d 511 (1979).

Mr. Telfair also states on appeal that the Bankruptcy Court never ruled on the issue of whether or not an implied trust was formed, although the Bankruptcy Court did, in fact, find no implied trust. While Mr. Telfair apparently argues that this Court should find an implied trust on these funds, his argument is confusingly misplaced. In the portion of his Appellate Brief dedicated to the implied trust theory, he argues that *under North Carolina law,* this Court: should find an implied trust. The Court has no idea why he relies on North Carolina law, and he makes no mention of why the law of that state is even relevant to this case. Accordingly, there is no reason for this Court to disturb the holding below.

Even though there is no definitive case law from the Georgia courts on this particular issue, the Court is convinced that no trust: was formed under Georgia law. The Security Deed does not provide a clear manifestation of intent to create a trust and the Court finds the manner in which other courts have approached the subject convincing. Ultimately, however, the Court is most convinced that no trust exists because the Georgia courts refuse to recognize a fiduciary duty in this type of lending relationship. See supra Part IV.B.I. A contrary conclusion in the face of the overwhelming case law denying mortgagor/mortgagee fiduciary relationships would be untenable. Accordingly, the

Court affirms that portion of the Bankruptcy Court's decision holding that no trust was formed.

3. No agency relation was created.

The Bankruptcy Court held that no agency relation was created because under the Security Deed Mr. Telfair retained no control over how First Union handled the tax and insurance funds. *Accordingly,* Judge Dalis found that First Union did not owe Mr. Telfair a fiduciary duty predicated on the alleged agency relation. On appeal, Mr. Telfair argues that the Bankruptcy Court erred when it found no agency relationship. He contends that First Union was acting as Mr. Telfair's agent when it used the escrow funds to pay insurance premiums and taxes.

Section 10-6-1 of the Official Code of Georgia provides that "[t]he relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1(1994). As the Bankruptcy Court correctly noted, Georgia state courts and federal courts have interpreted this provision narrowly. In Flournoy v. City Finance of Columbus, 679 F.2d 821, 823-24 (11th Cir. 1982), the Court of Appeals for the Eleventh Circuit stated:

> Section 1 of the Restatement (Second) of Agency defines agency as 'the fiduciary relation which results from the manifestation of consent by one person that the other shall act on his behalf *and subject to his control,* and consent by the other so to act.' (Emphasis added.) Despite arguably more general language in Georgia Code § 4-101 [current § 10-6-1], the Georgia courts have adopted this definition, including the element of control. Smith v. Merck, 206

Ga. 361, 57 S.E.2d 326 (1950); Washington National Insurance Co. v Mayor, 196 Ga. 126, 26 S.E.2d 359 (1943); Hampton v. McCord, 141 Ga. App. 97, 232 S.E.2d 582 (1977).

Mr. Telfair argues that First Union violated Sections 10-6-24 and 10-6-25 of the Official Code of Georgia. Section 10-6-24 states that "[w]ithout the express consent of the principal after a full knowledge of all the facts, an agent employed to sell may not himself be the purchaser; and an agent to buy may not himself be the seller." O.C.G.A. § 10-6-24 (1994). Section 10-6-25 provides that "[t]he agent shall not make a personal profit from his principal's property; for all such he is bound to account." O.C.G.A. § 10-6-25 (1994).

Because these provisions are prohibitions on the acts of an agent relative to his principal, in order to prevail on these charges, or the fiduciary breach predicated on the agency, Mr. Telfair first must prove that First Union was his agent. In order to accomplish that, he must show that First Union was subject to his control and acted on his behalf concerning the escrow funds. Flournoy, 679 F.2d at 823-24. However, the Security Deed does not convey a controlling power on Mr. Telfair. Under the terms of the Security Deed, Mr. Telfair retains no power over the use of the funds once they are paid to First Union. Paragraph Three of the Security Deed provides that if the escrow payments exceed actual tax and insurance liabilities due, First Union maintains the power to Choose whether such excess will be refunded or credited toward future payments. In other words, once Mr. Telfair makes the payment, he does not control the funds. While First Union is contractually bound to use the escrow funds for the stated purpose, Mr. Telfair does not retain any control over First Union as to how it will use the funds. The Security Deed creates a contractual obligation, not a fiduciary one. Cf. Southwestern Life Insurance Co. v. United

States, 560 F.2d at 634 (for tax purposes, receipt of tax and insurance escrow funds created "a contractual obligation and nothing more").

In addition to the fact that the Security Deed did not convey a controlling power on Mr. Telfair, it would be incorrect to state that First Union was acting on his behalf in regard to the escrow funds. In Georgia Farm Bureau Mutual Insurance Co. v. First Federal Savings and Loan Ass'n of Statesboro, the Court of Appeals of Georgia stated that a mortgagee did not act as the agent of its mortgagor when it pursued insurance to cover the home secured by the mortgage. 152 Ga. App. 16, 20, 262 S.E.2d 147 (1979). In that case, the insurance company sought to hold the mortgagee liable for fraud in connection with an application for insurance. 152 Ga. App. at 16. The mortgagor had allowed his policy to lapse and the mortgagee bank then made direct arrangements with the insurance company to maintain coverage on the secured property. Id. In holding that the mortgagee could not be held liable, the court stated, "it is clear that First Federal [the mortgagee] was acting to protect its own interests and in no way was acting as an agent for the insured [the mortgagor]" when it made efforts to continue the insurance coverage. Id. at 20. This case clearly contravenes Mr. Telfair's contention that First Union was acting on his behalf when it collected the escrow funds and used that money to pay for insurance and taxes. As the Bankruptcy Court properly concluded, the money was placed in escrow for the benefit of First Union, so that insurance and tax obligations would be covered on the property securing its loan to Mr. Telfair.

Georgia Farm Bureau makes it clear that First Union was acting on its own behalf when it required the tax and insurance payments and when it force placed the insurance because it wanted the collateral to be protected. Such self

interested behavior is inconsistent with an agency relation. Moreover, as the Court has already determined, Mr. Telfair retained no control over First Union under the terms of the Security Deed. In lieu of these conclusions, no agency relationship existed. Accordingly, that part of the Bankruptcy Court's holding below is affirmed.

C. The Bankruptcy Court did not abuse its discretion when it refused to strike the affidavit of Mr. de Gorter.

The Bankruptcy Court denied Mr. Telfair's motion to strike the affidavit of David de Gorter, who was formerly the Assistant Vice President for Marketing for Balboa Insurance Company. Mr. Telfair argues that this was an erroneous ruling because Mr. de Gorter's affidavit contradicted his prior deposition testimony.

It is clear that "abuse of discretion is the proper standard of review of a [trial] court's evidentiary rulings." Old Chief v. United States, 519 U.S. 172, 174 n. I, 117 S.Ct. 644, 647 n.l, 136 L.Ed.2d 574 (1997); Goulah v. Ford Motor Company, 118 F.3d 1478, 1483 (11th Cir. 1997). Furthermore, in this Circuit a reviewing court: "will not overturn an evidentiary ruling unless the moving party proves a substantial prejudicial effect." Judd v. Rodman, 105 F.3d 1339, 1341 (11th Cir. 1997).

Prior to the class certification hearing, Mr. Telfair filed a "Motion to Strike Affidavit of David DeGorter." In that motion, Mr. Telfair argued that portions of de Gorter's deposition testimony were contradicted by statements he made in his affidavit, which was submitted with First Union's motion for summary judgment. At the class certification hearing, Judge Dalis considered the issue and permitted both parties to present arguments concerning the

alleged contradiction. After considerable argument, Judge Dalis refused to strike the affidavit and held that Mr. Telfair's complaint went more towards the weight to be given to the affidavit than to its admissibility. He further stated that counsel for Mr. Telfair had pointed out the inconsistencies between the two documents to the court.

On appeal, Mr. Telfair argues that this ruling was erroneous. In support of his contention he cites Van T. Junkins and Associates, Inc. v. U.S. Industries, 736 F.2d 656 (11th Cir. 1984). In that case, the Court of Appeals for the Eleventh Circuit affirmed a district court's evidentiary ruling and held that "a district court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts its prior testimony without giving any valid explanation." Van T. Junkins, 736 F.2d at 656. The case involved allegations of fraud and misrepresentation in an alleged deal concerning the prefabricated building industry. Id. affiant at issue had directly contradicted his prior deposition testimony in at least two ways. First, in his deposition he stated that there was no condition attached to a certain purchase agreement, but in his affidavit he swore that the building purchase would assure him a dealership position. Id. at 657. Second, while being deposed he admitted that he had been told that his dealership application would have to go through a review board and then be approved by another person. Id. However, in his affidavit he stated that he was already awarded the dealership and that the application was merely a formality. Id. Together, these statements constituted positive, directly contradictory affirmations and the district court was correct to consider the affidavit a sham. Id.

In the case sub judice, however, de Gorter's affidavit is not rife with the type of directly contradictory testimony the court found in Van T. Junkins. After an independent

examination of the allegedly contradictory portions of the deposition and affidavit at issue here, this Court finds no express contradiction. The instances of contradiction that Mr. Telfair alleges consist of deposition testimony where de Gorter answered "I don't know,", "I'm not sure," and other similar statements. In his affidavit he swears to have personal knowledge of information that he did not have before. But this does not directly contradict a prior affirmation. In fact, it is entirely reasonable that de Gorter, testifying as a senior corporate official, might have spoken with employees in his department after the deposition and secured the knowledge he swears to in his affidavit.

Moreover, Mr. Telfair has made no attempt to show that he was prejudiced by the trial court's refusal to strike the affidavit, and such a showing is clearly required. Judd, F.3d at 1341. First Union argued that counsel for Mr. Telfair already had knowledge of everything contained in the affidavit, and Mr. Telfair has not denied that statement. Furthermore, Judge Dalis acknowledged that Mr. Telfair's arguments would influence the weight he would give the affidavit. Finally, the information contained in the affidavit does not appear to have had any impact upon the Bankruptcy Court's ruling on the summary judgement motion.

In lieu of these considerations, this Court cannot say that the Bankruptcy Court abused its discretion when it refused to strike the affidavit of David de Gorter. Accordingly, that portion of the Bankruptcy Court's holding is affirmed.

D. The Bankruptcy Court did not abuse its discretion when it denied the motion for class certification.

After he found that First Union was entitled to judgement on both Counts of Mr. Telfair's complaint, Judge Dalis denied the motion for class certification. On appeal, Mr. Telfair contends that this was erroneous,[9] although he makes no substantive argument as to why. For rather obvious reasons, this ground of appeal fails.

"The [trial] court's decision whether to certify a class may only be overturned if it constitutes an abuse of discretion." Heaven v. Trust Company Bank, 118 F.3d 735 (11th Cir. 1997). Federal Rule of Civil Procedure 23 clearly contemplates a decision on the class certification issue prior to a decision on the merits. See Fed. R. Civ. P. 23(c)(1) (1999) (stating "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained"); Fed. R. Civ. P. 23 advisory committee's note (explaining that determination of certification issue prior to ruling on the merits contemplated by Rule 23 fights problem of one-way intervention). Nevertheless, scores of courts have recognized that it is sometimes more efficient and economical to proceed directly to the merits of an action before reaching class issues. See Pharo v. Smith, 621 F.2d

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[9] 9 In this very brief portion of his Appellate Brief, and at several other sections of the brief, Mr. Telfair gives a cryptic and elusive cite to Eliza Kirkland v. Midland Mortgage, CV198-083 (S.D. Ga. 1998). Apparently, the Kirkland case involved issues similar to those presented here, although the case, which has since settled, was pending before a different Judge in this District. Even so, Mr. Telfair's citations to this case give the Court very little to go on because they give no point citation, and provide useless parentheticals like "supra" with no corresponding prior citation (App. Br. at pp. 30, 41) and "see also, testimony at the class certification hearing where that fact in Kirkland has never been disputed." (Reply Br. at p.13). It should come as no surprise that this Court has not considered anything from that case because counsel has provided no direction. Indeed, "Judges are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

656, 663-664, reh'q granted in part and denied in part and remanded on other grounds, 625 F.2d 1226 (5th Cir. 1980); Thornton v. Mercantile Stores Company, Inc., 13 F.Supp.2d 1282, 1288-90 (M.D. Ala. 1998) (listing cases where courts have ruled on dispositive motions prior to reaching class issues).

Judge Dalis obviously decided that it was in the better interests of the parties and the Bankruptcy Court to proceed to the underlying merits before making a detailed analysis of the class issues in this case, even though his Order makes no express statement to that effect. It is also clear from his Order below that Judge Dalis made no explicit findings on the class certification issue; rather, he simply denied Mr. Telfair's motion for class certification as to each Count after reaching a substantive determination that First Union was entitled to summary judgement. This Court finds no abuse of discretion in proceeding to the merits first in this case. Cf. American Bar Association Section of Litigation, Report and Recommendation of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 208 (1986) (stating that "in an appropriate case pre-certification decision of a merits motion may advance a 'speedy and inexpensive' resolution of the controversy"). Furthermore, after an independent review of the legal issues presented in this case, this Court also concludes that the Bankruptcy Court did not abuse its discretion when it summarily denied Mr. Telfair's motion for class certification after it determined that his claims were without legal merit.

It is also worth noting that Mr. Telfair has proffered no substantive basis for his allegation that the denial of the class certification issue was erroneous. He has not argued that another class representative would be more appropriate, or that a class should otherwise be certified. In lieu of these

considerations and the foregoing analysis, the Court affirms that portion of the decision below.

Conclusion

After the Court's review of the legal issues presented in this case, one final matter remains for consideration. As the Court mentioned several times in its substantive analysis, the Court will not consider issues and arguments raised for the first time on appeal. See In re Daikin Miami Overseas, Inc., 868 F.2d 1201, 1206 (11th Cir. 1989); supra n.3, Part IV.A.2. In addition to the instances already mentioned in this Order, Mr. Telfair has proffered several arguments which the Court mentions now only to highlight that these matters were not considered because they were not raised in the Bankruptcy Court below. First, in his Reply Brief, Mr. Telfair devotes significant attention to the argument that First Union violated Bankruptcy Rule 2016. After an independent review of the motions filed below and the transcript of the class certification hearing, the Court found no reference to this argument. Accordingly, it was not considered here because it was not raised below, and Mr. Telfair has not argued that exceptional circumstances justify such consideration. Cf. Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir 1984) (articulating five exceptions to general rule that issues not raised below will not be considered on appeal). Second, he also argues in his Reply Brief that the position that Mr. Telfair retained no control over the tax and insurance funds was inconsistent with RESPA, 12 U.S.C. § 2609 and 24 C.F.R. 3500.17(b). Other than a passing reference to RESPA in the class certification hearing, the Court found no reference to these issues below. For the reasons articulated above, these issues were not considered on appeal.

After a full and appropriate consideration of all the issues properly raised in this appeal, the Court finds no error in the judgement entered in the Bankruptcy Court below. Judge Dalis committed no legal error when he awarded First Union judgement on Counts One and Two. Similarly, this Court finds no abuse of discretion in the admission of the de Gorter affidavit or the denial of the motion for class certification. Accordingly, the judgement of the Bankruptcy Court is **AFFIRMED**. First Union's Request for Oral Argument is **DENIED AS MOOT.**

SO ORDERED this 19th day of April, 1999.

/s/ William T. Moore, Jr.
UNITED STATES DISTRICT JUDGE SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
Augusta Division

Chapter 13 Case Number 92-12162

EUGENE TELFAIR

Debtor

Adversary Proceeding No. 97-01064A

EUGENE TELFAIR,
GAIL E. TELFAIR, and All
Other Person Similarly Situated

Plaintiffs

vs.

FIRST UNION MORTGAGE CORP.

Defendant

ORDER

The plaintiffs, Eugene and Gail Telfair, moved for class certification on two causes of action brought in this adversary proceeding, regarding the defendant's, First Union Mortgage Corporation ("First Union"), application of postconfirmation plan payments to attorney fees and expenses and First Union's force placing of the Telfairs'

insurance.[1] First Union moved for summary judgment in response. First Union's motion is granted and Mr. Telfair's motion is denied.

Federal Rule of Bankruptcy Procedure 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

Eugene Telfair and his wife obtained a Veteran's Administration ("VA") guaranteed loan in 1984 from First Union's predecessor in interest. As part of the loan, Mr. Telfair and his wife executed a VA form Security Deed[2] granting a security interest in their residential property in

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[1] I determined at the hearing on class certification that Gail Telfair is an inappropriate class representative and plaintiff in this proceeding because she was not a debtor in the bankruptcy case.

[2] The Security Deed provides in relevant part:
2. Together with and in addition to the monthly payments of principal and interest payable under the terms of the note secured hereby, he [Grantor] will pay to the Grantee as trustee (under the terms of this trust as hereinafter stated) on the first day of each month until the said note is fully paid, the following sums:

(a) A sum equal to the ground rents, if any, next due, plus the premiums that will next become due and payable on policies of fire and other hazard insurance covering these premises, plus taxes and assessments next due on the premises covered by this Security Deed (all as estimated by the Grantee, and of which the Grantor is notified) less all

sums already paid therefore, divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, taxes and assessments will become delinquent, such sums to be held by Grantee in trust to pay said ground rents, premiums, taxes, and special assessments.

(b) The aggregate of the amounts payable pursuant to subparagraph (a) and those payable on the note secured hereby, shall be paid in a single payment each month, to be applied to the following items in the order stated:

(I) ground rents, taxes, special assessments, fire and other hazard insurance premiums;

(II) interest on the note secured hereby; and

(III) amortization of the principal of said note.

Any deficiency in the amount of such aggregate monthly payment shall, unless made good by the Grantor prior to the due date of the next such payment, constitute an event of default under the Security Deed. At Grantee's option, Grantor will pay a late charge" not exceeding four per centum (4%) of any installment when paid more than fifteen (15) days after the due date thereof to cover the extra expense involved in handling delinquent payments, but such "late charge" shall not be payable out of the proceeds of any sale made to satisfy the indebtedness secured hereby, unless such proceeds are sufficient to discharge the entire indebtedness and all proper costs and expenses secured thereby.

3. If the total of the payments made by the Grantor under (a) of paragraph 2 preceding shall exceed the amount of payments actually made by the Grantee as trustee for ground rents, taxes, assessments, or insurance premiums, as the case may be, such excess shall be credited by the Grantee on subsequent payments to be made by the Grantor for such items or, at Grantee's option, as trustee shall be refunded to Grantor. If, however, such monthly payments shall not be sufficient to pay such items when the same shall become due and payable, the Grantor shall pay to the Grantee as trustee any amount necessary to make up the deficiency. Such payments shall be made within thirty (30) days after written notice from the Grantee stating the amount of the deficiency, which notice may be given by mail. If at any time the Grantor shall tender to the Grantee, in accordance

Richmond County, Georgia. Pursuant to the Security Deed, First Union required the Telfairs to place in escrow an amount to pay insurance, taxes and other costs. Paragraph

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with the provisions of the note secured hereby, full payment of the entire indebtedness represented thereby, the Grantee as trustee shall, in computing the amount of such indebtedness, credit to the account of the Grantor any credit balance remaining under the provisions of (a) of paragraph 2 hereof. If there shall be a default under any of the provisions of this Security Deed resulting in a public sale of the premises covered hereby, or if the Grantee acquires the property otherwise after default, the Grantee as trustee shall apply, at the time of the commencement of such proceedings, or at the time the property is otherwise acquired, the amount then remaining to credit of Grantor under (a) of paragraph 2 preceding, as a credit on the interest accrued and unpaid and the balance to the principal then remaining unpaid on said note.

6. Such expenses and fees as may be incurred in the protection of said premises, including the fees of any attorney employed by the Grantee for the collection of any or all of the indebtedness hereby secured, or foreclosure by Grantee's sale, or court proceedings or in any other litigation or proceeding affecting said premises, and attorneys' fees reasonably incurred in any other way, shall be paid by the Grantor.

8. He [Grantor] will continuously maintain hazard insurance, of such type or types and amounts as the Grantee may from time to time require, on the improvements now or hereafter on said premises, and except when payment for all such premiums has theretofore been made under (a) of paragraph 2 hereof, will pay promptly when due any premiums therefor. All insurance shall be carried in companies approved by Grantee and the policies and renewals thereof shall be held by Grantee and have attached thereto loss payable clauses in favor of and in form acceptable to the Grantee...

10. Grantee may perform any defaulted covenant or agreement of Grantor to such extent as Grantee shall determine, and any moneys advanced by Grantee for such purposes shall bear interest at the rate provided for in the principal indebtedness, shall thereupon become a part of the indebtedness secured by this instrument, ratably and on a parity with all other indebtedness secured hereby, and shall be payable thirty (30) days after demand.

three of the Security Deed refers to this account as a "trust" and to First Union as the "trustee." In 1988 the Telfairs failed to provide proof of insurance on their property. At that time First Union "force placed" the insurance by substituting an insurance company from whom First Union receives commissions for obtaining insurance business, instead of using the insurance company the Telfairs previously used for coverage of their home. The new company, Balboa Insurance Company ("Balboa"), charged higher premiums than the company the Telfairs had used. Mr. Telfair claims he did not receive notice of lapsed insurance and the force placing to Balboa by First Union. Balboa continued to insure the Telfair's property until after Mr. Telfair's bankruptcy filing. The Telfairs obtained their own insurance with State Farm as of March 31, 1998.

Mr. Telfair filed for chapter 13 protection on December 7, 1992. His plan was confirmed on May 3, 1993. Thereafter, First Union assessed Mr. Telfair attorney fees and expenses for First Union's filing motions to lift the stay of 11 U.S.C. § 362(a) on June 19, 1995, July 31, 1995, and May 20, 1996, due to Mr. Telfair's failure to make payment when due under the Chapter 13 plan and loan documents. First Union applied the payments received from the Chapter 13 trustee and the Telfairs to these fees and expenses, thus leaving a delinquency upon the completion of plan payments and Mr. Telfair's discharge. This caused the Telfairs to be in default, and First Union notified them of the pending foreclosure on their home. The Telfairs filed this adversary proceeding on September 23, 1997 seeking to obtain injunctive and equitable relief claiming a violation of 11 U.S.C. § 506(b) in collecting attorney fees and expenses without court approval, violation of the automatic stay of 11 U.S.C. § 362(a), and violation of the discharge injunction of 11 U.S.C. §§ 524 and 1328. Count two alleges First Union breached its fiduciary duties to Mr. Telfair subsequent to the

bankruptcy filing by profiting from escrow funds of Mr. Telfair placed in trust with First Union as trustee or agent. First Union force placed the Telfairs' insurance without notifying Mr. Telfair and received profits from such act, which is prohibited under O.C.G.A. §§ 10-6-24 and 10-6-25.

Mr. Telfair's first count seeks a determination that a secured creditor in a chapter 13 case cannot, without having attorney's fees and expenses allowed by the bankruptcy court under 11 U.S.C. § 506(b)[3], add its postpetition attorneys fees and expenses to the debt of a debtor or use postpetition payments made to the creditor to pay those unallowed fees and expenses. Mr. Telfair alleges a debtor's earnings subsequent to the filing constitute property of the estate under 11 U.S.C. § 1306(a) (2); First Union took property of the estate to pay unauthorized fees and expenses in violation of 11 U.S.C. § 362(a) (3) ; and First Union's violation of 11 U.S.C. §S 506 and 362(a) (3), by not applying the payments to principal and interest on the loan, caused Mr. Telfair irreparable harm due to the foreclosure of his home. First Union responds that Mr. Telfair does not have a claim under 11 U.S.C. § 506(b), because the section is inapplicable to attorney fees and expenses which arise postconfirmation, and 11 U.S.C. § 1322(b)(2)[4] and the Security Deed solely apply postconfirmation.

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[3] 11 U.S.C. § 506(b). Determination of secured status (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

[4] 411 U.S.C. § 1322(b) (2) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may--

The United States Supreme Court in Rake v. Wade, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993), held that § 506(b) only establishes the amount of an allowed preconfirmation secured claim, to the extent provided for under the applicable security agreement and note terms.

> Under § 506(b) the holder of an oversecured claim is allowed interest on his claim to the extent of the value of the collateral Section 506(b) "directs that postpetition interest be paid on *all* oversecured claims," Ron Pair, 489 U.S., at 245, 109 S.Ct., at 1032 (emphasis added), and, as the parties acknowledge, such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan .... The arrearages owed on the mortgages held by respondent are plainly part of respondent's oversecured claims. Under the unqualified terms of § 506(b), therefore, respondent is entitled to preconfirmation interest on these arrearages. Where the 'statutory language is clear, our "'sole function ... is to enforce it according to its terms.'" Ron Pair, *supra, at* 241, 109 S.Ct., at 1030 (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)). Accord, Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150, 117 L.Ed.2d 391 (1992) .... Construing §§ 506(b) and 1322(b) (5) together, and giving effect to both, we conclude that § 1322(b) (5) authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan, and

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(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; ....

that where the mortgagee's claim is oversecured, § 506(b) entitles the mortgagee to preconfirmation interest on such arrearages.

Rake v. Wade, 508 U.S. at 471-72, 113 S. Ct. at 291-92, 124 L. Ed. 2d 424. Section 506(b) is not a limitation on the allowance of attorney fees and expenses postconfirmation and predischarge nor does it authorize such fees postconfirmation. Simply put, § 506(b) has no application to claimed postconfirmation attorneys fees and expenses. 506 (b) Plaintiff's cause of action cannot be sustained under § 506(b).

Mr. Telfair also argues First Union violated the § 362[5] stay in failing to obtain court approval before applying

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[5] 11 U.S.C. § 362(a).

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [ii], or an application filed under section 5(a) (3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

collected payments to attorney fees and expenses. I previously held in In re MqKnight, 136 B.R. 891 (Bankr. S.D. Ga. 1992), that all property revests in the debtor upon confirmation and that only the postconfirmation earnings of the debtor used for payment under the plan remain property of the estate. Mr. Telfair's postconfirmation earnings used for payments made pursuant to his Chapter 13 plan are property of the estate until paid £o the creditor pursuant to the plan. The confirmed plan, as it pertains to First Union, provided that "Debtor shall make regular post-petition payments as they become due to creditors (named below) holding security interests in Debtor's residence. Any claim filed for pre-petition arrearage on such obligation shall be paid by distributions from the Chapter 13 Trustee. First Union Mortgage. . ." The Security Deed provides in paragraph 6 that

> [s]uch expenses and fees as may be incurred in the protection of said premises, including the fees of any attorney employed by the Grantee for the collection of any or all of the indebtedness hereby secured ... and attorneys' fees reasonably incurred in any other way, shall be paid by the Grantor.

The Security Deed and state law govern the allowance of attorney fees postconfirmation, not S 506(b). This deed provides First Union with authorization to assess and collect attorney fees. Mr. Telfair's counsel raises for the first time in brief opposing summary judgment that if § 506(b) is not applicable, First Union must in any event comply with the State law ten-day notice requirement under

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(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

O.C.G.A. § 13-1-11[6] before assessing attorney's fees upon default by a debtor and applying payment received from a debtor to these fees. Assuming that First Union was required

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[6] O.C.G.A. § 13-1-11 provides:

(a) Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectible as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to the following provisions:

(1) If such note or other evidence of indebtedness provides for attorney's fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness;

(2) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness and I0 percent of the amount of principal and interest owing thereon in excess of $500.00;

(3) The holder of the note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(b) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to this Code section where applicable.

to provide the notice under O.C.G.A. § 13-1-11 and failed to do so, there was no § 362 stay violation. Mr. Telfair made payments to First Union as required under his confirmed plan. The application of those payments once received by First Union may have violated state law but did not violate federal bankruptcy law. Bankruptcy Code § 362(a)(i), (2), (5), (6) & (7) prohibit conduct to enforce a prepetition debt. In this case the complained of attorneys fees collected by First Union were assessed postpetition. Section 362(a) (8) involves proceedings before the tax court and are clearly inapplicable. Section 362(a)(3) & (a)(4) prohibit postpetition actions against property of the estate. Postconfirmation the only property of the estate remaining is the debtor's postconfirmation earnings used as payments pursuant to the plan. However, once the payment is made, that is tendered to the creditor pursuant to the plan, the payment is no longer property of the estate. The payment becomes property of the creditor. Whether the creditor properly applied the payment is purely a question of state law. Section 362(a) has nothing to do with that application. There is no § 362(a) stay violation.

Mr. Telfair also asserts that First Union's application of postconfirmation payments to postconfirmation attorney's fees and expenses violated the discharge of 11 U.S.C. ~ 1328 and discharge injunction of 11 U.S.C. § 524. Neither provision is applicable here. Bankruptcy Code § 1328(a)(i) provides in part relevant to this case

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or

> disallowed under section 502 of this title, except any debt-
>
> (1) provided for under section 1322(b) (5) of this title ....

property of the estate remaining is the debtor's postconfirmation earnings used as payments pursuant to the plan. However, once the payment is made, that is tendered to the creditor pursuant to the plan, the payment is no longer property of the estate. The payment becomes property of the creditor. Whether the creditor properly applied the payment is purely a question of state law. Section 362(a) has nothing to do with that application. There is no § 362(a) *stay* violation.

Mr. Telfair also asserts that First Union's application of postconfirmation payments to postconfirmation attorney's fees and expenses violated the discharge of 11 U.S.C. § 1328 and discharge injunction of ll U.S.C. § 524. Neither provision is applicable here. Bankruptcy Code § 1328(a)(i) provides in part relevant to this case

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-
>
> (1) provided for under section 1322(b) (5) of this title ....

Bankruptcy Code § 524(a) provides in part relevant to this case

> (a) A discharge in a case under this title-
>
> (i) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of any action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived ....

The complained of debt, postconfirmation attorney's fees, was not a debt provided for under the debtor's plan nor allowed under § 502. Relative to First Union the debtor's plan requires the debtor to "make regular post-petition payments as they become due" and requires the filing of a claim "for prepetition arrearage on such obligation [to be] paid by distributions from the Chapter 13 Trustee." The plan does not provide for the payment of postpetition debt other than regular monthly payments. Additionally, the discharge of § 1328(a) specifically excludes any debt provided for under § 1322(b)(5),[7] which provision applies to the treatment

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[7] 11 U.S.C. § 1322(b)(5) provides

(b) Subject to subsections (a) and (c) of this section, the plan may-

(5) notwithstanding paragraph (2) of this subsection, [see footnote 4] provide for the curing of any default within a reasonable time

of the debt due First Union under the debtor's plan. The debtor's plan does not provide for postpetition debt due First Union other than the regular monthly payments and the discharge does not affect the debt due First Union pursuant to § 1322(b) (5). As the discharge does not affect the debt due First Union, the discharge injunction of § 524 has no application. Having found that Mr. Telfair's claim for inappropriately collected attorney fees and expenses in violation of § 506(b) and/or § 362(a) and/or § 524 and § 1328 does not survive First Union's motion for summary judgment, Mr. Telfair's motion for class certification is denied.

Count two of Mr. Telfair's claim asserts that the Telfairs placed money into an escrow account of which First Union became a trustee or agent, creating a fiduciary duty; First Union force placed the Telfairs' insurance postpetition using the escrow funds which were property of the estate, resulting in higher premiums for the Telfairs and a breach of fiduciary duty by First Union in receiving a commission for the act. Further, O.C.G.A. §§ 10-6-24 and 10-6-25[8] notice and profit requirements on agents were violated by this

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and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due ....

[8] O.C.G.A. § 10-6-24 & 25 provide:

O.C.G.A. §10-6-24. Agent not to buy or sell for himself. Without the express consent of the principal after a full knowledge of all the facts, an agent employed to sell may not himself be the purchaser; and an agent to buy may not himself be the seller.

O.C.G.A. §10-6-25. Agent must account for profit from principal's property. The agent shall not make a personal profit from his principal's property; for all such he is bound to account.

conduct. First Union responds that no fiduciary duty is established when a mortgagee requires a mortgagor to place in escrow enough money to pay insurance, taxes and other costs that would come due on the property. The issue is whether the escrow account created a trust or agency relationship, thus placing a fiduciary duty on First Union regarding its handling of the escrowed money. It does not.

Mr. Telfair's first argument that a trust was created when First Union as mortgagee required the Telfairs as mortgagor to place in escrow sums to pay taxes, insurance and other costs pursuant to the VA approved mortgage was addressed by the United States Court of Appeals for the Seventh Circuit. In analyzing a VA-approved mortgage with essentially the same language the court sought to determine "whether the mortgages create trusts requiring the defendant as trustee to account to the mortgagors as beneficiaries for any benefits the defendant may derive from use of the monthly payments." Judd v. First Fed. Sav. & Loan Ass'n of Indianapolis, 710 F.2d 1237, 1241 (7th Cir. 1983). The court held in relevant part:

> We again conclude that the district court was correct; despite the scattered use of the words "trust" and "trustee," and the phrase "in trust," the mortgages do not transform a traditional debtor-creditor relationship into a fiduciary relationship.
>
> The plaintiffs' argument is not new. Others have claimed that mortgage instruments --similar or identical to the V.A. form mortgage used here -- created trusts for management of monthly payments. And those claims have been defeated regularly. See, e.g., Kronisch, and cases cited therein; see also LaThrop v. Bell Federal Savings & Loan Ass'n., 68 Ill.2d 375, 12 Ill. Dec. 565, 370 N.E.2d 188 (1977),

cert. denied, 436 U.S. 925, 98 S. Ct. 2818, 56 L. Ed. 2d 768 (1978); Brooks v. Valley National Bank 113 Ariz. 169, 548 P.2d 1166 (1976); Carpenter v. Suffolk Franklin Savings Bank, 370 Mass. 314, 346 N.E.2d 892 (1976).

Simply stated, the words used in a document are not always conclusive evidence of a trust. The principal consideration is intent. See, e.g., Dixon v. White, 327 F.2d 434 (7th Cir. 1964) (Indiana law; plaintiff failed to prove that parties intended an express trust rather than merely a debtor-creditor relationship). Several factors indicate establishment of a debt rather than creation of a trust. If the monthly payments here are insufficient to cover first the sums due for taxes and insurance, and second the monthly loan debt, then the mortgagors are in default. There are no expressed restrictions on the mortgagee's use of the monthly payments until the liability arises to pay insurance and taxes. Additionally, none of the parties ever manifested an intention to create a trust other than by signing a form document ....[T]erms indicated that the monthly advance payments were part of the mortgage debt, and not trust contributions .... [T]he mortgage here, provided that a failure to make those payments constituted default. This clearly indicated that the bank required the advance payments as additional security for the mortgage debt. 161 N.J. Super. at 597, 392 A.2d at 180. See LaThrop, 68 Ill.2d at 383-84, 370 N.E.2d at 192. We...hold that the mortgages between the plaintiffs and the defendant created debts, not trusts ....

The mortgage instruments here establish standard debtor-creditor relationships; they neither imply

special deposits nor create trusts for handling the required monthly advance payments.

Judd, 710 F.2d at 1241-43. While the Seventh Circuit was analyzing whether the mortgagee must account to the mortgagor for interest earned on the escrow account, this holding extends to the situation in the present case. Per the Judd holding, a trust was not created by the Telfairs' deposit of money into an escrow account or by the inclusion of the "trust" and "trustee" language within the Security Deed. Furthermore, Georgia case law finds no fiduciary duty on a mortgagee of escrowed funds. Moore v. Bank of Fitzgerald, 225 Ga. App. 122, 126, 483 S.E.2d 135, 139 (1997) ('[T]here is 'particularly no confidential relationship between lender and borrower or mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests."); Knight v. First Fed. Sav. & Loan Ass'n, 151 Ga. App. 447, 260 S.E.2d 511, 515 (1979) ('The majority rule appears to be that funds paid by a mortgagor to an escrow account to be used by the mortgagee to meet tax and insurance obligations upon the property as they accrue do not constitute trust properties such as would render the mortgagee accountable to the mortgagor for any earnings or profits from the funds. Annot , Rights in Escrow Funds for Taxes, § 3, 50 A.L.R.3d 697, 701 (1973). Under the same reasoning, we conclude that there is no requirement as a matter of law for the lender to pay the borrower interest on funds escrowed for valid business reasons such as a reserve for the replacement of deteriorating equipment."). Mr. Telfair also asserted that an implied trust arose upon his placing money in the escrow account. Pursuant to the Judd, Moore, and Knight cases a trust did not arise in this situation, because the nature of the relationship was debtor-creditor. No distinction is made by the Georgia courts between express and implied trusts in this situation, thus this rationale extends to any claimed trust. Knight, 151 Ga. App. 447, 260 S.E.2d at 515.

Mr. Telfair's second argument is that a fiduciary duty arose on the mortgagee when the escrow account formed because the mortgagee became the agent for the mortgagor, thus creating an agency relationship. First Union denies that the mortgagor-mortgagee relationship creates an agency relationship. Therefore, according to First Union no fiduciary duty arose. O.C.G.A. § 10-6-1 determines under Georgia law when an agency relationship arises.

> The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf.

O.C.G.A. § 10-6-1. Georgia and federal courts interpreting this section adopt a narrow interpretation.

> Section 1 of the *Restatement (Second) of Agency* defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control,* and consent by the other so to act." (Emphasis added.) Despite arguably more general language in Georgia Code § 4-101 [currently O.C.G.A. 10-6-1], the Georgia courts have adopted this definition, including the element of control. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950); Washington National Insurance Co. v. Mayor, 196 Ga. 126, 26 S.E.2d 359 (1943); Hampton v. McCord, 141 Ga. App. 97, 232 S.E.2d 582 (1977).

Flournoy v. City Finance of Columbus, Inc, 679 F.2d 821, 823-24 (11th Cir. 1982) (bracketed information added) (emphasis in original).

Under the Security Deed no control was retained by the Telfairs over First Union's use of the escrow funds. Instead, First Union is given the ultimate decision in how the funds are to be used upon the Telfairs' default, and the Telfairs had no control over the use. Furthermore, the security Deed in effect provides that the money is to be placed in escrow for the benefit of First Union to insure the payment of taxes, insurance and other costs, not the Telfairs. Under the Security Deed, the Telfairs agreed to pay on a money to First Union to be held by First Union to pay on a monthly basis taxes encumbering the property and insurance covering the collateral securing the Telfairs' debt to First Union. Only a debtor-creditor relationship was created. Additionally, the escrow funds constituted additional security for the debt, which under the terms of the Security Deed, included attorneys fees incurred by First Union. This does not establish an agency relationship and, therefore, no fiduciary duty exists. First Union's motion for summary judgment is granted as to count two of the complaint, and Mr.. Telfair's motion for class certification is denied.

It is, therefore, ORDERED that First Union's Motion for Summary Judgment on the complaint is granted, and it is further ORDERED that Mr. Telfair's Motion for Class Certification is denied.

/S/ John S. Dalis
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Dated at Augusta, Georgia
This the 26th day of August, 1998.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 99-10846-AA

EUGENE TELFAIR

Plaintiff-Appellant

versus

FIRST UNION MORTGAGE CORPORATION

Defendant-Appellant

On Appeal from the United States District Court for the Southern District of Georgia

(Filed September 1, 2000)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING ENBANC

(Opinion ____, 11th Cir. 19__, __F.2d.__)

Before: TJOFLAT, MARCUS, and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section -(A) of the commencement or continuation of an action or proceeding for - (i) the establishment of paternity; or (ii) the establishment or modification of an order for alimony, maintenance, or support; or(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph subsection (a)(1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

((5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;)

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of -(A) an audit by a governmental unit to determine tax liability; (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;(C) a demand for tax returns; or (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or (18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section -

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -(A) the debtor has filed a plan of reorganization that has a reasonable

possibility of being confirmed within a reasonable time; or(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before

there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section -

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

* * *

11 U.S.C. § 506.

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in

conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless -

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

* * *

11 U.S.C. § 1306.

§ 1306. Property of the estate,

a) Property of the estate includes, in addition to the property specified in section 541 of this title -

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

* * *

11 U.S.C. § 1327.

§ 1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

* * *

11 U.S.C. §. 1329.

§ 1329. Modification of plan after confirmation.

a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to -

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

* * *

§ 2601. Congressional findings and purpose.

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local record- keeping of land title information.

* * *

12 U.S.C. § 2609.

§ 2609. Limitation on requirement of advance deposits in escrow accounts.

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower -

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and

other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided, however,* that in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated

taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Secretary shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current

monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

(d) Penalties

(1) In general

In the case of each failure to submit a statement to a borrower as required under subsection (c) of this section, the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for all such failures during any 12-month period referred to in subsection (b) of this section may not exceed $100,000.

(2) Intentional violations

If any failure to which paragraph (1) applies is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure -

(A) the penalty imposed under paragraph (1) shall be $100; and

(B) in the case of any penalty determined under subparagraph (A), the $100,000 limitation under paragraph (1) shall not apply.

* * *

24 C.F.R. §. 3500.17

§ 3500.17 (a) Escrow accounts.

(a) General. This section sets out the requirements for an escrow account that a lender establishes in connection with a federally related mortgage loan. It sets limits for escrow accounts using calculations based on monthly payments and disbursements within a calendar year. If an escrow account involves biweekly or any other payment period, the requirements in this section shall be modified accordingly. A HUD Public Guidance Document entitled "Biweekly Payments--Example" provides examples of biweekly accounting and a HUD Public Guidance Document entitled "Annual Escrow Account Disclosure Statement--Example" provides examples of a 3-year accounting cycle that may be used in accordance with paragraph (c)(9) of this section. A HUD Public Guidance Document entitled "Consumer Disclosure for Voluntary Escrow Account Payments" provides a model disclosure format that originators and servicers are encouraged, but not required, to provide to consumers when the originator or servicer anticipates a substantial increase in disbursements from the escrow account after the first year of the loan. The disclosures in that model format may be combined with or included in the Initial Escrow Account Statement required in Sec. 3500.17(g).

* * *

24 C.F.R. §. 3500.17 (b)

§ 3500.17(b).

(b) Definitions. As used in this section:

Acceptable accounting method means an accounting method that a servicer uses to conduct an escrow account analysis for an escrow account subject to the provisions of Sec. 3500.17(c).

Aggregate (or) composite analysis, hereafter called aggregate analysis, means an accounting method a servicer uses in conducting an escrow account analysis by computing the sufficiency of escrow account funds by analyzing the account as a whole. Appendix E to this part sets forth examples of aggregate escrow account analyses.

Annual escrow account statement means a statement containing all of the information set forth in Sec. 3500b(i). As noted in Sec. 3500.17(i), a servicer shall submit an annual escrow account statement to the borrower within 30 calendar days of the end of the escrow account computation year, after conducting an escrow account analysis.

Conversion date means the date three years after the publication date of the rule adding this section (i.e., October 27, 1997) by which date all servicers shall use aggregate analysis.

Cushion or reserve (hereafter cushion) means funds that a servicer may require a borrower to pay into an escrow account to cover unanticipated disbursements or

disbursements made before the borrower's payments are available in the account, as limited by Sec. 3500.17(c).

Deficiency is the amount of a negative balance in an escrow account. As noted in Sec. 3500.17(f), if a servicer advances funds for a borrower, then the servicer must perform an escrow account analysis before seeking repayment of the deficiency.

Delivery means the placing of a document in the United States mail, first-class postage paid, addressed to the last known address of the recipient. Hand delivery also constitutes delivery.

Disbursement date means the date on which the servicer actually pays an escrow item from the escrow account.

Escrow account means any account that a servicer establishes or controls on behalf of a borrower to pay taxes, insurance premiums (including flood insurance), or other charges with respect to a federally related mortgage loan, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay. The definition encompasses any account established for this purpose, including a "trust account", "reserve account", "impound account", or other term in different localities. An "escrow account" includes any arrangement where the servicer adds a portion of the borrower's payments to principal and subsequently deducts from principal the disbursements for escrow account items. For purposes of this section, the term "escrow account" excludes any account that is under the borrower's total control.

Escrow account analysis means the accounting that a servicer conducts in the form of a trial running balance for an escrow account to:

(1) Determine the appropriate target balances;

(2) Compute the borrower's monthly payments for the next escrow account computation year and any deposits needed to establish or maintain the account; and

(3) Determine whether shortages, surpluses or deficiencies exist.

Escrow account computation year is a 12-month period that a servicer establishes for the escrow account beginning with the borrower's initial payment date. The term includes each 12-month period thereafter, unless a servicer chooses to issue a short year statement under the conditions stated in Sec. 3500.17(i)(4).

Escrow account item or separate item means any separate expenditure category, such as "taxes" or "insurance", for which funds are collected in the escrow account for disbursement. An escrow account item with installment payments, such as local property taxes, remains one escrow account item regardless of multiple disbursement dates to the tax authority.

Initial escrow account statement means the first disclosure statement that the servicer delivers to the borrower concerning the borrower's escrow account. The initial escrow account statement shall meet the requirements of Sec. 3500.17(g) and be in substantially the format set forth in Sec. 3500.17(h).

Installment payment means one of two or more payments payable on an escrow account item during an escrow account computation year. An example of an installment payment is where a jurisdiction bills quarterly for taxes.

Payment due date means the date each month when the borrower's monthly payment to an escrow account is due to the servicer. The initial payment date is the borrower's first payment due date to an escrow account.

Penalty means a late charge imposed by the payee for paying after the disbursement is due. It does not include any additional charge or fee imposed by the payee associated with choosing installment payments as opposed to annual payments or for choosing one installment plan over another.

Phase-in period means the period beginning on May 24, 1995, and ending on the conversion date, i.e., October 27, 1997, by which date all servicers shall use the aggregate accounting method in conducting escrow account analyses.

Post-rule account means an escrow account established in connection with a federally related mortgage loan whose settlement date is on or after May 24, 1995.

Pre-accrual is a practice some servicers use to require borrowers to deposit funds, needed for disbursement and maintenance of a cushion, in the escrow account some period before the disbursement date. Pre-accrual is subject to the limitations of Sec. 3500.17(c).

Pre-rule account is an escrow account established in connection with a federally related mortgage loan whose settlement date is before May 24, 1995.

Shortage means an amount by which a current escrow account balance falls short of the target balance at the time of escrow analysis.

Single-item analysis means an accounting method servicers use in conducting an escrow account analysis by computing the sufficiency of escrow account funds by considering each escrow item separately. Appendix E to this part sets forth examples of single-item analysis.

Submission (of an escrow account statement) means the delivery of the statement.

Surplus means an amount by which the current escrow account balance exceeds the target balance for the account.

System of recordkeeping means the servicer's method of keeping information that reflects the facts relating to that servicer's handling of the borrower's escrow account, including, but not limited to, the payment of amounts from the escrow account and the submission of initial and annual escrow account statements to borrowers.

Target balance means the estimated month end balance in an escrow account that is just sufficient to cover the remaining disbursements from the escrow account in the escrow account computation year, taking into account the remaining scheduled periodic payments, and a cushion, if any.

Trial running balance means the accounting process that derives the target balances over the course of an escrow account computation year. Section 3500.17(d) provides a description of the steps involved in performing a trial running balance.

* * *

24 C.F.R. § 3500.17 (c)(1)(i)

§ 3500.17 (c)(1)(i).

(c) Limits on payments to escrow accounts; acceptable accounting methods to determine limits.

(1) A lender or servicer (hereafter servicer) shall not require a borrower to deposit into any escrow account, created in connection with a federally related mortgage loan, more than the following amounts:

(i) Charges at settlement or upon creation of an escrow account. At the time a servicer creates an escrow account for a borrower, the servicer may charge the borrower an amount sufficient to pay the charges respecting the mortgaged property, such as taxes and insurance, which are attributable to the period from the date such payment(s) were last paid until the initial payment date. The "amount sufficient to pay" is computed so that the lowest month end target balance projected for the escrow account computation year is zero (-0-) (see Step 2 in appendix E to this part). In addition, the servicer may charge the borrower a cushion that shall be no greater than one-sixth (1/6) of the estimated total annual payments from the escrow account.

* * *

24 C.F.R. § 3500.17 (c)(5)

§ 3500.17.(c)(5).

(5) Cushion. For post-rule accounts, the cushion shall be no greater than one-sixth (\1/6\) of the estimated total annual disbursements from the escrow account using aggregate analysis accounting. For pre-rule accounts, the cushion may

not exceed the total of one-sixth of the estimated annual disbursements for each escrow account item using single-item analysis accounting. In determining the cushion using single-item analysis, a servicer shall not divide an escrow account item into sub-accounts, even if the payee requires installment payments.

* * *

24 C.F.R. § 3500.17 (c)(f)(1)

§ 3500.17(c)(f)(1).

(f) Shortages, surpluses, and deficiencies requirements--(1) Escrow account analysis. For each escrow account, the servicer shall conduct an escrow account analysis to determine whether a surplus, shortage or deficiency exists.

(i) As noted in Sec. 3500.17(c)(2) and (3), the servicer shall conduct an escrow account analysis upon establishing an escrow account and at completion of the escrow account computation year.

(ii) The servicer may conduct an escrow account analysis at other times during the escrow computation year. If a servicer advances funds in paying a disbursement, which is not the result of a borrower's payment default under the underlying mortgage document, then the servicer shall conduct an escrow account analysis to determine the extent of the deficiency before seeking repayment of the funds from the borrower under this paragraph (f).

* * *

24 C.F.R. § 3500.17 (c)(f)(2)

§ 3500.17.(c)(f)(2).

(2) Surpluses. (i) If an escrow account analysis discloses a surplus, the servicer shall, within 30 days from the date of the analysis, refund the surplus to the borrower if the surplus is greater than or equal to 50 dollars ($50). If the surplus is less than 50 dollars ($50), the servicer may refund such amount to the borrower, or credit such amount against the next year's escrow payments.

(ii) These provisions regarding surpluses apply if the borrower is current at the time of the escrow account analysis. A borrower is current if the servicer receives the borrower's payments within 30 days of the payment due date. If the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may retain the surplus in the escrow account pursuant to the terms of the mortgage loan documents.

(iii) After an initial or annual escrow analysis has been performed, the servicer and the borrower may enter into a voluntary agreement for the forthcoming escrow accounting year for the borrower to deposit funds into the escrow account for that year greater than the limits established under paragraph (c) of this section. Such an agreement shall cover only one escrow accounting year, but a new voluntary agreement may be entered into after the next escrow analysis is performed. The voluntary agreement may not alter how surpluses are to be treated when the next escrow analysis is performed at the end of the escrow accounting year covered by the voluntary agreement.

* * *

38 C.F.R. § 36.4326

§ 36.4326. Hazard insurance.

The holder shall require insurance policies to be procured and maintained in an amount sufficient to protect the security against the risks or hazards to which it may be subjected to the extent customary in the locality. All moneys received under such policies covering payment of insured losses shall be applied to restoration of the security or to the loan balance. Flood insurance will be required on any building or personal property securing a loan at any time during the term of the loan that such security is located in an area identified by the Federal Emergency Management Agency as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act, as amended. The amount of flood insurance must be at least equal to the lesser of the outstanding principal balance of the loan or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act, as amended. The Secretary cannot guarantee a loan for the acquisition or construction of property located in an area identified by the Federal Emergency Management Agency as having special flood hazards unless the community in which such area is situated is then participating in the National Flood Insurance Program.

* * *

38 U.S.C.§ 3703(a)(2)(A)

§ 3703(a)(2)(A).

(2)(A) Any housing loan which might be guaranteed under the provisions of this chapter, when made or purchased by

any financial institution subject to examination and supervision by any agency of the United States or of any State may, in lieu of such guaranty, be insured by the Secretary under an agreement whereby the Secretary will reimburse any such institution for losses incurred on such loan up to 15 per centum of the aggregate of loans so made or purchased by it.

* * *

38 U.S.C.§ 3703(a)(2)(B)

§ 3702(a)(2)(B).

(2)(B) Loans insured under this section shall be made on such other terms, conditions, and restrictions as the Secretary may prescribe within the limitations set forth in this chapter.

* * *

38 U.S.C.§ 3703(c)(1)

§ 3703(c)(1).

(c)(1) Loans guaranteed or insured under this chapter shall be payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the provisions of this chapter and Regulations of the Secretary issued pursuant to this chapter, and shall bear interest not in excess of such rate as the Secretary may from time to time find the loan market demands, except that in establishing the rate of interest that shall be applicable to such loans, the Secretary shall consult with the Secretary of Housing and Urban Development regarding the rate of interest applicable to home loans insured under section 203(b) of the National

Housing Act (12 U.S.C. 1709(b)). In establishing rates of interest under this paragraph for one or more of the purposes described in clauses (4) and (7) of section 3710(a) of this title, the Secretary may establish a rate or rates higher than the rate specified for other purposes under such section, but any such rate may not exceed such rate as the Secretary may from time to time find the loan market demands for loans for such purposes.

(2)

No. 00-630

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In The

Supreme Court of the United States

EUGENE TELFAIR,

Petitioner,

v.

FIRST UNION MORTGAGE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are attorneys' fees incurred post-confirmation by an oversecured homestead lender in a Chapter 13 bankruptcy proceeding subject to the operation of 11 U.S.C. § 506(b)?

2. Did the three lower courts err in any respect in holding that, under Georgia law, First Union is not in a fiduciary relationship with Petitioner?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent, First Union Mortgage Corporation states that it is a wholly owned subsidiary of First Union Corporation, a publicly held company with shares traded on the New York Stock Exchange.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the Petition.

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COUNTER-STATEMENT OF THE CASE

In June of 1984, the Petitioner and his wife obtained a VA-guaranteed mortgage loan from Cameron-Brown Company (a First Union Mortgage Corporation predecessor) in the original principal amount of $37,900.00. As security for the loan, Petitioner executed a VA form Security Deed dated June 8, 1984. One provision of the Security Deed required the Petitioner to maintain adequate hazard insurance on the premises in order to protect the lender's collateral.

In 1987, Petitioner's hazard insurance carrier gave notice that the existing insurance policy would not be renewed at the expiration of the policy year. On at least two separate occasions, First Union notified Petitioner in writing that he would be required to obtain alternate replacement insurance for the lapsed policy. When Petitioner nonetheless failed to obtain replacement insurance for the property, First Union "force placed" the insurance coverage, as it was entitled to do under the loan documents, in order to keep the property insured. The coverage obtained in 1988 was placed through a master insurance contract First Union had with Transamerica Premier Insurance Company.

The new policy premium was advanced by First Union and later debited from Petitioner's escrow account. First Union was authorized by the Security Deed and VA guidelines[1] to pay the premium in this fashion. Additionally, Petitioner endorsed over to First Union a check from his prior insurer, reflecting a rebate of the paid but

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[1] *See* 38 C.F.R. 36.4326.

unearned premium that was being refunded in conjunction with the nonrenewal of the policy. The cover letter for the check stated it would be used to "replenish the funds in your escrow account" that had been disbursed for the force placed insurance.

Force placed hazard coverage is very different from a traditional homeowner insurance policy. The premiums are generally two to four times higher because the carrier is prevented from conducting any objective underwriting on the insured risk. Instead, the carrier agrees to accept any and all properties submitted by the mortgage servicer for coverage, no questions asked, based upon the amount of coverage requested by the servicer. Furthermore, from an actuarial perspective, the types of properties that are submitted for force placed coverage historically constitute a higher risk pool than other residential properties. Based upon the increased loss experience and the lack of objective underwriting, the insurance companies that write force placed coverage receive approval from the various state insurance regulators for premium rate structures in excess of that which is available for standard homeowner policies.

In Petitioner's case, his annual insurance premium increased from approximately $300 to $502 after his default caused the coverage to be force placed. Petitioner acknowledged notification of this increase in premium, but still took no steps to obtain his own replacement coverage until 1998 – *ten years* after the initial lapse. During each year following the initial force placement of Petitioner's hazard insurance coverage, he was sent an annual renewal notice, approximately 60 days prior to the anniversary date of the policy, advising him again of his

obligation to obtain hazard insurance coverage. In recent years, this notice also advised Petitioner (in all-capital letters) that force placed insurance costs much more and may be less comprehensive in coverage than a standard homeowner policy, and that a First Union insurance agency affiliate would receive an agency commission. Additionally, on each anniversary date, the force placed insurance carrier issued a declaration sheet showing the amount of coverage and the premium, which was mailed directly to Petitioner.

Apart from the force placed insurance issue, in 1988 Petitioner began what would later become a chronic pattern of late payments and payment defaults. For example, in August of 1988, he was forced to cure a 6-month arrearage in payments in order to avoid foreclosure. By 1992, he was again several months in arrears, precipitating his filing of bankruptcy at the end of that year.

In his Chapter 13 Plan, confirmed on May 3, 1993, Petitioner proposed to cure his pre-petition mortgage arrearage with First Union through regular monthly payments to the Chapter 13 Trustee. First Union timely filed a proof of claim prior to confirmation, which was accepted and allowed by the Bankruptcy Court. This proof of claim established First Union's status as an oversecured homestead mortgage lender. Under the terms of Petitioner's Chapter 13 Plan, he was required to remain current in his regular post-petition payments to First Union in addition to his Plan payments to the Trustee. However, Petitioner did neither.

First, the Petitioner became delinquent in several payments to the Trustee during the pendency of the

Chapter 13 Plan, causing the Trustee to file two separate motions to dismiss for that reason. At the same time, he also defaulted on several post-petition payments to First Union. These payment defaults resulted in the filing of three motions to lift stay by First Union, all well after confirmation. The first two motions were voluntarily withdrawn to permit tracing of certain alleged payments. Following the filing of a third motion to lift stay, there remained two money orders allegedly tendered by Petitioner which could not be located through the research efforts of First Union. On September 16, 1996, the Bankruptcy Court issued a Consent Order which identified these two money orders, and specified a ninety (90) day period to allow the debtor to trace the funds through the issuer of the money orders. According to the terms of the Order, if the payments could not be successfully traced within that time frame, the debtor was to replace them. However, Petitioner did not undertake any tracing efforts whatsoever. Nor did he thereafter replace the two missing payments. Thus, by early 1997, the post-petition payment defaults related to the Petitioner's mortgage loan remained uncured, and were compounded by additional subsequent payment defaults.

On April 9, 1997, the Trustee reported that the Plan had been completed and all creditors had been fully paid. A discharge was then granted to Petitioner by the Bankruptcy Court on April 23, 1997. Thereafter, on May 8, 1997, First Union's attorneys' fee and filing fee related to the third motion to lift stay were assessed against the

Petitioner's loan account.[2] Only $410.00 of First Union's total legal fees of $1,170.00, all related to Petitioner's post-confirmation payment defaults, were ever charged back to Petitioner's account. Due to the several uncured post-petition payment defaults, foreclosure proceedings were then initiated against Petitioner's property. Those proceedings were suspended by the filing of Petitioner's Complaint on September 23, 1997.

REASONS FOR DENYING THE WRIT

Certiorari review of the decision of the U.S. Court of Appeals for the Eleventh Circuit should be denied because this civil action does not present any issues of law which are worthy of this Court's review. The two issues for which Petitioner seeks this Court's review rest on an imagined split among the Circuit Courts of Appeal which does not exist, and an argument which was never raised in the trial court.

Certiorari review is not warranted because the claims Petitioner advanced in the lower courts were resolved based upon this Court's decision in *Rake v. Wade*, 508 U.S. 464 (1993) and the common law of the State of Georgia.

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[2] Petitioner incorrectly asserts that First Union satisfied the disputed fee from payments made by the Trustee under the Chapter 13 plan. In fact, *all* of the Trustee payments were properly applied by First Union to cure the pre-petition arrearage. The attorney fee debit at issue did not take place until *after* the Trustee's final report and the entry of a discharge by the Bankruptcy Court.

The Complaint in this case, brought by Petitioner individually and on behalf of a putative class of persons similarly situated, set forth two counts against Respondent, First Union Mortgage Corporation. In the first count, Petitioner claimed that First Union's assessment of post-confirmation attorney's fees against his loan account without an express order from the Bankruptcy Court violated 11 U.S.C. § 506(b). The second count presented a Georgia common law claim for breach of fiduciary duty. The Bankruptcy Court granted summary judgment to First Union on both claims.

The Bankruptcy Court's decision on the first count was based upon a straightforward application of the decision in *Rake v. Wade*, 508 U.S. 464 (1993). In *Rake*, this Court held that § 506(b) applies in a Chapter 13 bankruptcy only from the petition date until the date of confirmation. *Id.* at 468 ("§ 506(b) applies only from the date of filing through the confirmation date"). Since it was undisputed below that the attorney's fees at issue accrued *after* the confirmation of Petitioner's Chapter 13 plan, First Union did not violate 11 U.S.C. § 506(b).

With regard to the second count, Petitioner asserted his claim for breach of fiduciary duty under Georgia law. On appeal in the courts below, and again before this Court, Petitioner seeks to recast this claim as a violation of the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609. This argument was neither raised in nor decided by the Bankruptcy Court and, in any event, is not the basis upon which the lower courts' judgments rest. The lower courts correctly found that the Security Deed and mortgage loan documents do not, as a matter of law, create any fiduciary duty, and summary

judgment against Petitioner was properly granted on this claim.

1. After the Confirmation of a Chapter 13 Bankruptcy Plan, an Oversecured Homestead Mortgage Lender's Assessment of Attorney's Fees is Not Subject to 11 U.S.C. § 506(b).

The first count in Petitioner's Complaint asserted a violation of 11 U.S.C. § 506(b).[3] The claim was resolved in the lower courts by reference to the opinion in *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993). In *Rake*, this Court held that § 506(b) only establishes the amount of an allowed pre-confirmation secured claim, to the extent provided for under the applicable note and security agreement:

> Under § 506(b) the holder of an oversecured claim is allowed interest on his claim to the extent of the value of the collateral. Section 506(b) "directs that postpetition interest be paid on *all* oversecured claims," *Ron Pair*, 489 U.S. at 245 (emphasis added), and, as the parties acknowledge, *such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan*. . . . Under the

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[3] 11 U.S.C. § 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

> unqualified terms of § 506(b), therefore, respondent is entitled to *preconfirmation* interest on these arrearages. Where the statutory language is clear, our " 'sole function . . . is to enforce it according to its terms.' " *Ron Pair, supra,* at 241 (quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L. Ed. 442, (1917)). *Accord, Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L. Ed. 2d 391 (1992).
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> Section 1322(b)(5), on the other hand, states that a Chapter 13 plan may "provide for the curing of any default and the maintenance of payments" on certain claims. While § 1322(b)(5) authorizes a Chapter 13 plan to provide for payments on arrearages to effectuate a cure after the effective date of the plan, nothing in that provision dictates the terms of the cure. In particular, § 1322(b)(5) provides no indication that the allowed amount of the arrearages cured under the plan may not include interest otherwise available as part of the oversecured claim under § 506(b). . . . Construing §§ 506(b) and 1322(b)(5) together, and giving effect to both, we conclude that § 1322(b)(5) authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan, and that where the mortgagee's claim is oversecured, § 506(b) entitles the mortgagee to *preconfirmation* interest on such arrearages.

Rake v. Wade, 508 U.S. 464, 471-72 (1993) (citations omitted, emphasis added). Thus, the Bankruptcy Court correctly held that § 506(b) had no application to the disputed post-confirmation attorney's fees and expenses in this case.

2. There Is No Split Among the Courts of Appeal as to What Constitutes Post-Confirmation Property of a Chapter 13 Estate.

Although not separately advanced as an independent claim for relief, the lower courts nonetheless addressed Petitioner's argument that First Union's post-confirmation assessment of an attorney's fee, pursuant to the terms of the mortgage loan documents, violated the automatic stay of 11 U.S.C. § 362(a). The Bankruptcy Court concluded that the assessment of fees was proper under the mortgage loan documents, and did not impact or affect the Petitioner's ability to make his Chapter 13 Plan payments to the Trustee. Only the sums necessary to make those Plan payments constituted property of the bankruptcy estate after confirmation.

The only two Circuit Courts of Appeal to squarely address the issue of what constitutes post-confirmation property of the estate in a Chapter 13 proceeding have both adopted the so-called estate transformation approach. *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000); *In re Heath*, 115 F.3d 521 (7th Cir. 1997). The resolution of this legal issue involves a reconciliation of the language found in 11 U.S.C. § 1306(a) and § 1327(b), as those provisions relate to the automatic stay of § 362. Under the estate transformation approach, property of the estate following confirmation includes only that property which is necessary to fund the debtor's Chapter 13 plan. All other property revests in the debtor at confirmation. In this case, the Eleventh Circuit reasoned that the estate transformation approach "protects the interests of both the debtor and the creditors." *Telfair*, 216 F.3d at 1340 (A-11). The court further explained:

> We therefore echo the conclusion of the Seventh Circuit and "read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." *In re Heath*, 115 F.3d at 524. In this case, after confirmation, only the amount required for the plan payments remained property of the estate.

Id.

Contrary to the Petitioner's claim, the Eighth Circuit has not adopted a different approach. In *Security Bank of Marshalltown, Iowa v. Neiman*, 1 F.3d 687 (8th Cir. 1993), the court held only that a Chapter 13 estate continues to exist after confirmation, without specifically addressing what property is included in that estate. Indeed, the opinion itself makes this distinction by reference to a Utah bankruptcy court decision:

> *In re Adams*, 12 B.R. 540 (Bankr. D. Utah 1981), presumed the Chapter 13 estate survived after confirmation, and the only issue was what the estate included and what was protected by the stay. *That is not the issue in the present case* – we must determine if an estate exists post-confirmation.

Id. at 690 (citation and emphasis added). In short, because the Eighth Circuit expressly sidestepped the issue of what constitutes property of the estate, it cannot be said to have decided the matter contrary to the Seventh and Eleventh Circuits.

Moreover, the facts and issues before the court in *Neiman* were distinctly different from those addressed in this and the *Heath* cases. In *Neiman*, the debtors incurred business debts after confirmation of their Chapter 13 plan, and subsequently converted their bankruptcy to a Chapter 7 proceeding. The issue addressed by the *Neiman* court was whether any Chapter 13 estate exists after confirmation to validate the Trustee's priority award of administrative expenses for preservation of the estate. The court held that the bankruptcy estate continues to exist after confirmation so that priority treatment of post-confirmation administrative expense was in order. *Id.* at 691. In short, there is no split among the Circuit Courts of Appeal as to what constitutes post-confirmation property of a Chapter 13 estate.

3. Under Georgia Law, There is No Fiduciary Duty Running from First Union to the Petitioner.

Petitioner's claim for breach of fiduciary duty was based on the legal theory that the mortgage loan documents created an express or implied trust between him, as borrower, and First Union, as a mortgage loan servicer. According to Petitioner, First Union was prohibited under Georgia law from taking any action that was not in Petitioner's best interest. This breach of fiduciary duty claim was found wanting because, under Georgia law, the circumstances here did not evidence the creation of an express or implied trust between the parties. Instead, the lower courts found an ordinary debtor-creditor relationship.

As to Petitioner's argument that a common law trust was created by virtue of the escrow account provided for in the mortgage loan documents, the lower courts relied upon federal cases interpreting similar VA mortgage loan documents as well as Georgia cases concerning express and implied trusts. *See, e.g., Judd v. First Fed. Sav. & Loan Ass'n of Indianapolis*, 710 F.2d 1237, 1241 (7th Cir. 1983) ("despite the scattered use of the words 'trust' and 'trustee' and the phrase 'in trust' the mortgages do not transform a traditional debtor-creditor relationship into a fiduciary relationship"); *Moore v. Bank of Fitzgerald*, 225 Ga. App. 122, 126, 483 S.E.2d 135, 139 (1997); *Knight v. First Fed. Sav. & Loan Ass'n*, 151 Ga. App. 447, 260 S.E.2d 511, 515 (1979). Upon review of these authorities, the Eleventh Circuit properly held that neither an express nor an implied trust was created:

> As correctly found by the bankruptcy and district courts, there is no evidence that either type of trust was formed because there is no indication that [Petitioner] and First Union intended the escrow funds to comprise a trust corpus. Rather, First Union's retention of future tax and insurance payments inured to the benefit of both parties in protecting the secured property.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1341 (11th Cir. 2000) (A-13).

The Eleventh Circuit did not address the RESPA argument now advanced before this Court because it was not raised in the Bankruptcy Court below. This Court has long held that it "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987);

Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). The Circuit and District Courts below expressly found that this RESPA allegation was not raised or litigated in the trial court. "These [RESPA] arguments were not timely raised before the bankruptcy court, and we decline to hear them for the first time in this appeal." *Telfair*, 216 F.3d at 1337 n. 6 (A-4). "In addition to the instances already mentioned in this Order, [Petitioner] has proffered several arguments which the Court mentions now only to highlight that these matters were not considered because they were not raised in the Bankruptcy Court below. . . . Other than a passing reference to RESPA in the class certification hearing, the Court found no reference to these issues below." *Telfair v. First Union Mortgage Corp.*, Civil Action No. CV-198-193 (S.D. Ga., April 19, 1999) (unpublished) (A-55). Because the RESPA argument was not raised or litigated in the trial court, it is not a proper subject for certiorari review.

CONCLUSION

There being no basis upon which to grant certiorari review of the decision of the Eleventh Circuit, the Petition for Writ of Certiorari herein should be denied.

November 20, 2000

Respectfully submitted,

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